No. 80-427

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., *et al.*,
Petitioners,

v.

GENE MCNARY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the District Court erred in dismissing this action on grounds that the Tax Injunction Act, 28 U.S.C. §1341, bars a suit at law for damages under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 arising from Respondents' past discriminatory practices in assessing Petitioners' property and in taxing Petitioners.

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No.

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Petitioners,

v.

GENE MCNARY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray the Supreme Court to grant a writ of certiorari to review the order of the United States Court of Appeals for the Eighth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. A, *infra*, p. A-1) is reported at 622 F.2d 415. The opinion of the United States District Court for the Eastern District of Missouri is reported at 478 F.Supp. 1231 (App. B, *infra*, pp. A-2 to A-7).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, *en banc,* was entered on June 19, 1980, (App. A, *infra,* p. A-1), affirming the judgment of the United States District Court for the Eastern District of Missouri, entered on November 7, 1979 (App. B, *infra,* p. A-2). The final mandate of the United States Court of Appeals for the Eighth Circuit was entered on July 15, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the proper proceeding for redress.

28 U.S.C. §1341: The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

STATEMENT OF THE CASE

The questions presented arise out of the District Court's dismissal of an action for actual and punitive damages to

remedy the deprivation of Petitioners' rights under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983. The individual Petitioners, J. David Cassilly and Lynn F. Cassilly, are owners of real property with newly constructed improvements (hereinafter referred to as a "new home") located in St. Louis County, Missouri. Petitioner Fair Assessment In Real Estate, Inc. (hereinafter referred to as "FAIR") is a not-for-profit membership corporation formed by real estate taxpayers in St. Louis County to promote equitable enforcement of real property tax laws in the State of Missouri. Respondents are various past and present officials of St. Louis County and the Missouri State Tax Commission entrusted with responsibility for enforcement of real property tax laws. (Respondent Gene McNary is the County Executive of St. Louis County (formerly "County Supervisor"); Respondents William A. Skaggs and Edmund J. Pung are present and past Directors of Revenue of St. Louis County; Respondents Charles T. Schneider and Frank J. Antonio are present and past Tax Assessors of St. Louis County; Respondents Donald G. Williams, Stephen C. Snyder, and Tom R. Otto are present and past members of the Missouri State Tax Commission.) Petitioners alleged that Respondents have maliciously, willfully, invidiously, systematically, knowingly, and intentionally enforced property tax laws to the damage of Petitioners and other owners of new homes. According to Petitioners' allegations, Respondents have done so by maliciously, willfully, invidiously, systematically, knowingly, and intentionally assessing new homes at a higher rate than old homes and by maliciously, willfully, invidiously, systematically, knowingly, and intentionally singling out such owners who have previously protested such disparity for property tax reassessement.

Petitioners filed this action in the District Court for the Eastern District of Missouri, Eastern Division, on July 2, 1979. On August 13, 1979, Respondents Gene McNary, William A. Skaggs, Edmund J. Pung, Charles T. Schneider and Frank J. Antonio, filed their joint Motion to Dismiss Petitioners' Com-

plaint for failure to state a claim for which relief may be granted and for lack of jurisdiction over the subject matter. On or about August 16, 1979, Respondents Donald G. Williams, Thomas R. Otto, and Stephen C. Snyder, filed an Answer generally denying the allegations in Petitioners' Complaint.

After considering the pleadings, suggestions and memoranda filed by the various parties, and without the introduction of evidence or oral argument, the District Court entered its order on November 7, 1979 dismissing this action in its "entirety," on the basis of the Tax Injunction Act, 28 U.S.C. §1341 (App. B, *infra,* pp. A-2 to A-7). Thereafter, on June 19, 1980, upon consideration of the briefs and oral arguments of the parties, the Eighth Circuit, *en banc,* entered its order affirming the District Court judgment but issued no opinion (App. A, *infra,* p. A-1).

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for Writ of Certiorari for two reasons. The case presents an important question of federal law that has not been, but should be, settled by this Court, and a conflict exists in various decisions of the Court of Appeals of several Circuits in respect of the issue presented here.

1. Petitioners' lawsuit was a claim against certain state and local officials as individuals for having maliciously, willfully, invidiously, systematically, knowingly, and intentionally singled out and discriminated against Petitioners by imposing upon them a discriminatory tax. Petitioners were singled out for this discriminatory treatment for two reasons—one, their real property was newer than the countywide average, and two, they had previously appealed their tax assessment.

The District Court dismissed the lawsuit on grounds that the Tax Injunction Act, 28 U.S.C. §1341, barred the federal courts from hearing Petitioners' action at law for damages. The Eighth Circuit, *en banc,* affirmed, upon a four-to-four vote, and issued no opinion.

Petitioners' action is founded upon a claim of discrimination involving property rights. This Court has held that no distinction should be drawn between an invasion of "personal" rights and "property" rights of persons claiming their right to be free from unlawful discrimination. *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 552 (1972).

Therefore, by ruling as they have, the District Court has adopted, and the Eighth Circuit has affirmed, a rule that state and local officials may impose any kind of discriminatory tax—even, for example, a head tax on Blacks, Jews, or Lithuanians —without fear that the federal courts will protect those so discriminated against. The federal courts have not since 1954 been willing to so restrict their power to ensure citizens' civil rights. By their ruling, the courts below have taken that step by

extending the rather clear language of the Tax Injunction Act beyond its limits. The Act refers to equitable sorts of remedies, not to actions for damages in law proceedings.

This Court has recently indicated that it considers the scope of the Tax Injunction Act a matter of significant importance. It has agreed to review *LaSalle National Bank* v. *Rosewell,* 604 F.2d 530 (7th Cir. 1979), *cert. granted,* 100 S. Ct. 1310 (1980), in which the question is when a court should disregard the bar of the Tax Injunction Act on grounds that a state lacks a plain, speedy, and efficient review process in tax matters. The issue presented here is whether the Tax Injunction Act bars actions at law for damages as well as injunctive actions. The importance of the question presented here is equal to that presented in *LaSalle National Bank,* for both address the extent of the limit that the Act imposes upon citizens' efforts to protect their civil rights.

The matter presented here is an important question of federal law that has not been, but should be, settled by this Court.

2. In addition to the foregoing, this Court should grant the petition for Writ of Certiorari because the Circuits are in conflict over whether the Tax Injunction Act bars the federal courts from jurisdiction over actions at law for damages. The Seventh Circuit has clearly decided the question contrary to the Eighth Circuit in *Fulton Market Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978), *cert. denied,* 439 U.S. 1121 (1979).

The Eighth Circuit is joined in its decision below by a lower court in the Fifth Circuit in a clear holding that the Tax Injunction Act bars such action. *Advertiser Co.* v. *Wallace,* 446 F. Supp. 667 (M.D. Ala. 1978). Moreover, Respondents herein have argued that *Ludwin* v. *City of Cambridge,* 592 F.2d 606 (1st Cir. 1979); *Evangelical Catholic Communion, Inc.* v. *Thomas,* 373 F. Supp. 1342 (D. Vt. 1973), *aff'd,* 493 F.2d 1397 (2d Cir. 1974) (mem.); *Hickmann* v. *Wujick,* 488 F.2d 875 (2d Cir. 1973); *Horn* v. *O'Cheskey,* 387 F. Supp. 1280 (D.N.M.

1974), are to the same effect, although Petitioners dispute that interpretation of those cases.

By implication, a line of cases that have held that the Tax Injunction Act does not bar actions in federal court for tax refunds supports the conclusion in *Fulton Market*. *Bormann* v. *Tomlin*, 461 F. Supp. 193 (S.D. Ill. 1978); *Louisville & Nashville Railroad* v. *Atkins*, 390 F. Supp. 576 (M.D. Tenn.), *aff'd*, 423 U.S. 802 (1975); *Southland Mall, Inc.* v. *Garner*, 293 F. Supp. 1370 (W.D. Tenn. 1968); *Rico Argentine Mining Co.* v. *Board of County Commissioners*, 215 F. Supp. 208, 209 (D. Colo. 1963); *Central Steel Wire Co.* v. *City of Detroit*, 99 F. Supp. 639, 101 F. Supp. 470 (E.D. Mich. 1951), relying upon *Ott* v. *Mississippi Barge Line Co.*, 336 U.S. 169 (1949), as reaching the same result. If those cases are correct, then an action for damages against individual state officers, and not against a public treasury, must not be barred by the Tax Injunction Act.

Other courts among the Circuits, have ruled that the Tax Injunction Act does bar actions for tax refunds. Thus, contrary to the above cited cases stand *United Gas Pipe Line Co.* v. *Whitman*, 595 F.2d 323 (5th Cir. 1979); *Kelley* v. *Springett*, 527 F.2d 1090 (9th Cir. 1975); *United States* v. *State Tax Commission*, 505 F.2d 633 (5th Cir. 1974); *Evangelical Catholic Communion, Inc.* v. *Thomas, supra; Bland* v. *McHann*, 463 F.2d 21 (5th Cir. 1972). In addition, Respondents have argued that *Gray* v. *Morgan*, 371 F.2d 172 (7th Cir. 1966), and *Natural Gas Pipeline Co. of America* v. *Sergeant*, 337 F. Supp. 88 (D. Kan. 1972), likewise so hold, although Petitioners disagree with that conclusion.

Thus, the Circuits are in conflict over whether a civil rights action at law for damages is barred by the Tax Injunction Act. The decision in *Fulton Market* directly supports the proposition that the Act does not prohibit such an action. The decision below and decisions in at least one other Circuit reach the op-

posite result. Still other decisions among the Circuits support *Fulton Market* indirectly by holding that the Tax Injunction Act is not a bar to actions at law for tax refunds. However, other decisions within the Circuits hold that the Tax Injunction Act bars such tax refund cases. The issue has become embroiled in a series of conflicting and disorganized opinions among the Circuits that require determination by this Court.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 17, 1980

APPENDIX

APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 79-2031

Fair Assessment in Real Estate Association, Inc.; David J. Cassilly; Lynn F. Cassilly, Appellants, v. Gene McNary; William A. Skaggs; Edmund J. Pung; Charles T. Schneider; Frank J. Antonio; Donald G. Williams; Tom R. Otto; Stephen C. Snyder, Appellees.	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: June 11, 1980

Filed: June 19, 1980

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY, McMILLIAN and ARNOLD, Circuit Judges, *En Banc.*

ORDER

The judgment of the district court is affirmed by an equally

divided court en banc. Chief Judge Lay and Judges Ross, McMillian and Arnold would reverse the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEAL, EIGHTH CIRCUIT.

APPENDIX B

United States District Court
Eastern District of Missouri
Eastern Division

Fair Assessment in Real Estate Association, Inc., et al.,
Plaintiffs,
vs.
Gene McNary, et al.,
Defendants.

No. 79-805 C (2)

ORDER

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendants' motion to dismiss be and is granted and that this case be and is dismissed in its entirety.

/s/ JOHN F. NANGLE
United States District Judge

Dated: November 7, 1979.

United States District Court
Eastern District of Missouri
Eastern Division

Fair Assessment in Real Estate Association, Inc., et al., Plaintiffs, vs. Gene McNary, et al., Defendants.	No. 79-805 C (2)

MEMORANDUM

(Filed November 7, 1979)

This case is now before the Court on the motion to dismiss of several defendants. Plaintiffs brought this suit pursuant to 42 U.S.C. §1983 alleging that defendants' acts and practices in connection with the taxing of real property in St. Louis County, Missouri have deprived plaintiffs of equal protection and due process of the law. Two specific practices of defendants are alleged to violate these constitutional guarantees: 1) properties with new improvements are assessed at approximately 33-1/3% of their current market value, while properties without recent improvements are assessed at approximately 22% of their current market value, due to the fact that there has not been a general reassessment in the County since 1960; and 2) property owners who successfully appeal their assessment are specifically targeted for reassessment the next year. By these actions, defendants are alleged to have "maliciously, willfully, invidiously, systematically, knowingly, and intentionally" violated plaintiffs' constitutional rights.

Plaintiffs in this suit are Fair Assessment in Real Estate Association, Inc. ("FAIR"), and J. David and Lynn F. Cassilly. Fair is a non-profit corporation whose purpose is to promote and encourage equitable enforcement of the property tax laws

in Missouri. J. David and Lynn F. Cassilly, husband and wife, are owners of real property with recent improvements in St. Louis County. Plaintiffs J. David and Lynn F. Cassilly seek to recover actual damages in the amount of the alleged over-assessments, plus punitive damages. Plaintiff FAIR seeks to recover the monies it has expanded in its attempts to obtain equitable enforcement of the state real property tax law on behalf of its members.

Three groups of defendants are involved. Defendants Charles Schneider and Frank Antonio are the principal defendants. They are the present Tax Assessor in St. Louis County and his predecessor, respectively. It is their allegedly unlawful assessment of real property in St. Louis County which is the gravamen of this complaint.

Defendant Gene McNary is the Supervisor of St. Louis County. Defendants William Skaggs and Edmund Pung are the Director of Revenue of St. Louis County and his predecessor, respectively. These defendants allegedly have supervisory responsibility over the assessor and have acquiesced in the assessor's illegal conduct.

Defendants Donald Williams, Stephen Snyder, and Tom Otto are members of the State Tax Commission. As members of the Commission, these defendants allegedly have supervisory responsibility over the other defendants with respect to the state property tax laws, and have allegedly refused to correct the illegal practices. These three defendants answered the complaint. All the other defendants filed the motion to dismiss now under consideration.

Defendants contend that this suit for damages is barred by the Tax Injunction Act, 28 U.S.C. §1341. That Act provides as follows:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under the state

> law where a plain, speedy and efficient remedy may be had in the courts of such state.

This Act, by its very terms, prohibits this Court from entering an injunction which would enjoin, suspend, or restrain the assessment, levy, or collection of the property tax now in question. *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 551 F.2d 1093 (7th Cir. 1977). It has also been held that this Act prohibits the granting of a declaratory judgment as to the collectability of a state tax. *Illinois Central R. Co.* v. *Howlett,* 525 F.2d 178 (7th Cir. 1975). See, also, *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293 (1943). The issue now presented is whether the Act prohibits a suit for damages in the circumstances presently alleged.

The Seventh Circuit has recently answered this question in the negative. *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978). In that case, plaintiff alleged that defendants had

> systematically, knowingly, intentionally, fraudulently and invidiously assessed its property at levels other than permitted by law and greatly in excess of the levels at which property was generally assessed in Cook County in those years. Id. at 1073.

The court reviewed the cases construing the statute, as well as its legislative history, and determined that permitting an action for damages would not run counter to the underlying policy considerations of the Act.

This Court must disagree with the conclusion reached by the Seventh Circuit, at least to the extent that plaintiffs attempt to apply it in this case. In *Cullerton,* the court summarized the purposes of the Tax Injunction Act as follows:

> The statute, its legislative history and significant cases indicate that the primary evil to be avoided is federal

> equitable relief which would disrupt the state taxing process. A federal court injunction or declaratory judgment would not only undermine and jeopardize a state's ability to collect its revenue but would also seriously damage the delicate balance inherent in our federalistic system of government. Id. at 1078.

The court concluded that allowing a damage action under the circumstances alleged would not interfere with those purposes.

In the present case, plaintiffs do not allege that they were discriminated against due to their race, ethnic background or political affiliation. Cf. *Cullerton,* id. at 1079. Rather, they are complaining that the system adopted by defendants results in overassessments of their property. The relief sought comports with these allegations - actual damages to bring their tax payments into line with those of other taxpayers. In effect, the individual plaintiff seek a refund of the alleged overpayments.

It has been held that the Tax Injunction Act bars suits for refunds as well as anticipatory relief. *Kelly* v. *Springett,* 527 F.2d 1090 (9th Cir. 1975); *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972), cert. denied 410 U.S. 966 (1973). Such a result is dictated by the underlying purposes of the Tax Injunction Act. To allow such suits would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief. State tax collection officials could be summoned into federal court to defend their assessments against claims for refunds as well prayers for punitive damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property. Allowance of such claims would result in this Court being a source of appellate review of all state property tax classifications. This Court can not condone such a result.

Property taxation is a subject which is best left to the states to perform in their own ways. The notion of "comity", so strongly reinforced by the Supreme Court in *Younger* v. *Harris,* 401 U.S. 37 (1971), is equally applicable in the present situation

> . . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. Id. at 44.

It can not be disputed that plaintiffs have means to rectify what they consider an unjust situation through the state's own processes. In fact, they have been largely successful in doing just that. Plaintiffs and similarly situated taxpayers have brought numerous suits in state courts challenging the prevailing system of property tax assessment.

In *Breckenridge Hotels Corp.* v. *Leachman,* 571 S.W.2d 251 (Mo.banc. 1978), it was held that the rights of taxpayers such as plaintiffs were violated when their property was assessed at a percentage of current market value much higher than other property in St. Louis County. In *State ex rel Cassilly* v. *Riney,* 576 S.W.2d 325 (Mo.banc. 1979), the Missouri Supreme Court directed the State Tax Commission to ensure that all property was properly reassessed. This direction prompted the passage of legislation to implement a general reassessment in the County. Senate Bill 247, et al. Vernon's Missouri Legislative Service 1979, No. 2, p. 367.

It is clear that plaintiffs' proper course for relief is through the state's channels. This Court should not interfere in the legitimate interests of the state in implementing its own property tax system. Cf. *Younger,* supra. To allow a suit under the present circumstances would be doing just that.

Plaintiff FAIR, as an alleged representative of property taxpayers, is obviously in the same position as the individual plaintiffs. Similarly, the defendants who answered the complaint rather than joining in the motion to dismiss now under con-

sideration are in the same position as the moving defendants. Therefore, this suit will be dismissed in its entirety.

/s/ JOHN F. NANGLE
United States District Judge

Dated: November 7, 1979.

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

United States District Court, Eastern District of Missouri

July 2, 1979	Complaint for Damages for Violation of Civil Rights filed.
August 13, 1979	Motion to Dismiss by Defendants McNary, Skaggs, Antonio, Pung, and Schneider filed.
August 16, 1979	Answer of Defendants Williams, Otto, and Snyder filed.

November 7, 1979 Order and Memorandum entered by Judge John F. Nangle.

United States Court of Appeals for the Eighth Circuit

July 15, 1980 Order entered.

IN THE UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-0805-C(3)

Fair Assessment In Real Estate Association, Inc.; and

J. David Cassilly and
Lynn F. Cassilly,
Plaintiffs,

v.

Gene McNary; William A. Skaggs; Edmund J. Pung; Charles T. Schneider; Frank J. Antonio; Donald G. Williams; Tom R. Otto; and Stephen C. Snyder,
Defendants.

COMPLAINT FOR DAMAGES FOR VIOLATION OF CIVIL RIGHTS

Introduction

1. This suit, brought pursuant to 42 U.S.C. §1983, seeks compensation for the deprivation of rights conferred on the Plaintiffs by the Fourteenth Amendment to the United States Constitution and the Due Process guarantees of the Constitution of the State of Missouri. The acts complained of are the fruit of the practices of many years for assessing and taxing real estate in St. Louis County. These practices deprived the plaintiffs of their rights to due process of law and the equal protection of the laws in that:

(a) Properties with newly constructed improvements, hereinafter referred to as "new homes," are taxed upon roughly 33 1/3% of current true market value even though properties with older improvements, hereinafter referred to as "old homes," are taxed, on average, upon approximately 22% of current true market value.

(b) Owners of residential property who exercise their right under state law to appeal the St. Louis County Tax Assessor's evaluation, and are successful, are specifically targeted for reassessment the following year.

2. These practices are the result of malicious, willful, invidious, intentional, knowing, and systematic conduct on the part of the defendants. Plaintiffs' claims are for damages suffered during the period 1975-1979 as a result of these practices.

Jurisdiction And Parties

3. This suit arises under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983, which provides that any person who, while acting under color of state law, engages in conduct so as to deprive another of his constitutional rights, shall be liable in damages. With respect to Plaintiff FAIR, jurisdiction is conferred upon this court by 28 U.S.C. §1343(3), the jurisdictional counterpart of section 1983, and by 28 U.S.C. §1331, the general federal-question jurisdictional provision. Jurisdiction over the claims of the individual Plaintiffs is based upon 28 U.S.C. §1343(3).

4. Plaintiff Fair Assessment in Real Estate Association, Inc., hereinafter referred to as "FAIR", was founded in 1975 as a public membership unincorporated association composed of real estate taxpayers. Its purpose was and is to promote and encourage equitable enforcement of the property tax laws in Missouri. In 1979, FAIR was incorporated pursuant to the laws of the State of Missouri as a not-for-profit corporation. Prior to its incorporation, Plaintiff FAIR had more than 2,000 members.

5. Plaintiffs J. David Cassilly and Lynn F. Cassilly are husband and wife, and are the owners of a new home located at 15859 Kettington Road in St. Louis County. They reside in St. Louis County.

6. Defendant Gene McNary is the Supervisor of St. Louis County. He resides in St. Louis County.

7. Defendant William A. Skaggs is the Director of Revenue of St. Louis County. He resides in St. Louis County.

8. Defendant Edmund J. Pung was Defendant Skaggs' predecessor in office and was Director of Revenue of St. Louis County until January, 1977. He resides in St. Louis County.

9. Defendant Charles T. Schneider is the Tax Assessor of St. Louis County. He resides in St. Louis County.

10. Defendant Frank J. Antonio was Defendant Schneider's predecessor in office and was Tax Assessor of St. Louis County until February, 1978. He resides in St. Louis County.

11. Defendants Donald G. Williams and Stephen C. Snyder are members of the State Tax Commission, hereinafter referred to as the "STC," of the State of Missouri. Defendant Williams has been a member of the STC since February, 1978. Defendant Snyder was a member of the STC throughout 1978. Defendant Williams resides in Carroll County, and Defendant Snyder resides in Cole County.

12. Defendant Tom R. Otto was a member of the STC until March 1, 1979, and was a member of the STC throughout 1978. He resides in Jackson County.

13. Each defendant is sued herein individually. At all times and for all purposes here in question, each defendant acted under color of law.

14. The property that is the subject of the acts of the Defendants complained of herein is real property located in St. Louis

County. The majority of the acts of the Defendants complained of herein occurred in St. Louis County.

Statement Of First Claim For Relief

15. Plaintiffs J. David and Lynn F. Cassilly incorporate by reference as though fully set forth hereinbelow, paragraphs 1 through 14 of this Complaint.

16. Prior to 1974, Defendant Antonio and his predecessors in office took the view that they were required under Article X, §4(b) of the Missouri Constitution to assess for taxation all non-exempt real property in St. Louis County at 33 1/3% of current true market value. Since 1974, Defendant Antonio and his successor, Defendant Schneider, have been required by §137.115 R.S.Mo. to assess such real property at 33 1/3% of current true market value.

17. The imposition of taxes on real property constitutes a taking of property within the scope of the Due Process clauses of the United States and the Missouri Constitutions.

18. Plaintiffs J. David Cassilly and Lynn F. Cassilly purchased their home from the builder in 1974. Plaintiffs J. David and Lynn F. Cassilly are obligated to pay all real estate taxes levied against their property.

19. Defendant Antonio assessed Plaintiffs' property for the year 1975 at a valuation of $27,320.00, which was approximately 33 1/3% of the then current true market value. Based on this valuation and the applicable tax rate, the plaintiffs were required to pay, and did pay, taxes in the amount of $2253.90 for 1975, and $2256.63 for 1976.

20. In 1977 Plaintiffs pursued their adminstrative remedies and appealed Defendant Antonio's assessed valuation of $27,320.00 to the St. Louis County Board of Equalization. The result of this appeal was a reduction in the valuation of their property to $23,600.00 which was approximately 29% of the

1975 true market value. Based on this valuation and the applicable tax rate, Plaintiffs were required to pay, and did pay, taxes in the amount of $1,956.44 for 1977.

21. In 1978, Defendants Antonio and Schneider again assessed Plaintiffs' property at a valuation of $27,320.00. Plaintiffs again appealed; this appeal is still pending before the STC. Plaintiffs paid taxes, under protest pending outcome of the appeal, in the amount of $2378.21 for 1978.

22. Plaintiffs have not yet received from Defendant Schneider notification of assessed value for 1979, but allege that they are informed and believe it will be the same as it was in 1978, $27,320.00, and that they will be required to pay taxes at least in the amount of $2166.00.

23. In so valuing Plaintiffs' property, Defendants Antonio and Schneider discriminated invidiously against Plaintiffs and took their property without due process of law in violation of Plaintiffs' rights under the Fourteenth Amendment to the United States Constitution and under the Due Process guarantees of the Constitution of the State of Missouri, in that:

(a) The last county-wide reassessment of real property in St. Louis County was completed in 1961. Property was assessed at that time at approximately 33 1/3% of true market value. Since 1961, there has been no system whatsoever for periodic county-wide reassessment of residential property in St. Louis County.

(b) Defendants Antonio and Schneider have continuously assessed property in St. Louis County so that property generally was assessed at less than the ratio required by law. In 1977, the average assessed-value-to-appraised-value ratio in St. Louis County had fallen to 22.2%. Since 1977, that ratio has remained the same or declined even further.

(c) Notwithstanding this, Defendants Antonio and Schneider have, throughout their tenure in office, assessed thousands of new homes at 33 1/3% of the then current true market value. In 1975, 1976, 1977, and 1978, Defendants Antonio and Schneider assessed Plaintiffs' property at a level greatly in excess of the levels at which property in St. Louis County generally is assessed.

24. In so valuing Plaintiffs' property, Defendants Antonio and Schneider maliciously, willfully, invidiously, systematically, knowingly, and intentionally violated Plaintiffs' constitutional rights as set out above in that:

(a) Throughout their tenure in office, they have had full knowledge of the enormous disparities in the levels of assessment of property in St. Louis County, and have made numerous public statements on said subject. Public statements by the Defendant Antonio on the need for county-wide reassessment date back at least as far as 1966. Defendants Antonio and Schneider were required by law to furnish to the STC. and did furnish, monthly reports showing on an individual basis for ten sales per month, the ratio of assessed value to sales price. Since 1976 they have received copies of thousands of appeals filed with the St. Louis County Board of Equalization, in which the appellant taxpayers sought relief on the basis of Defendants' discrimination against them by virtue of these disparities. They have also been informed through official public sources of these disparities; in particular, by a 1975 report of the Missouri State Auditor that found the weighted average of assessed-value-to-sales-price ratio for St. Louis County to have been 22.8% for the year 1974, and by a 1978 report made on behalf of the STC that found the average-value-to-appraised-value ratio for St. Louis County to have been 22.2% for the year 1977.

(b) They have maliciously, invidiously, intentionally and systematically engaged in, and continue to engage in, the course of conduct that produced the enormous disparities in property assessment levels in St. Louis County. Notwithstanding their full knowledge as set out above, they have willfully failed and refused to correct these practices or to prevent them from recurring. On the contrary, by their acts in reassessing upwards the properties of individuals who had obtained relief from the St. Louis County Board of Equalization, they have demonstrated their purpose to adhere to their unlawful policies and practices.

25. At all times during their tenure in office, Defendants McNary, Skaggs, and Pung have had supervisory responsibility over the operations of the office of Defendants Antonio and Schneider, have been fully aware of the policies of said office, and have directed and acquiesed in the operations of the office in carrying out such policies. Notwithstanding their full knowledge, they have maliciously, invidiously, and willfully failed and refused to correct these practices or to prevent them from reoccuring. Thus, they have systematically, knowingly, and intentionally violated plaintiffs' constitutional rights.

26. Defendants Williams, Otto, and Snyder, as members of the STC, are under a duty to, and have the responsibility for, exercising general supervision over Defendants McNary, Skaggs, and Schneider to the end that state property tax laws are complied with. They are fully aware of the assessment policy in St. Louis County. Notwithstanding their full knowledge, they are maliciously, invidiously, and willfully failing and refusing to correct these practices. They have systematically, knowingly, and intentionally violated Plaintiffs' constitutional rights.

27. All of the defendants, and each of them, during their terms of office have been required pursuant to Article 3, Section 10 of the Constitution of the State of Missouri to ensure that real property taxes be uniform within St. Louis County.

28. The foregoing malicious, willful, systematic, knowing, and intentional discrimination as practiced upon thousands of taxpayers in St. Louis County has been found by the Supreme Court of the State of Missouri to be, and is, clearly unconstitutional.

29. The foregoing unlawful acts and course of conduct have damaged plaintiffs. Had Defendants Antonio and Schneider assessed Plaintiffs' property at the county-wide average rate of 22.2% for the years 1975-1979, said assessed value would have been $18,195.00. Based on this valuation, Plaintiffs' taxes would have been $1501.00 for 1975, $1503.00 for 1976, $1508.00 for 1977, and $1443.00 for 1978. In addition, Plaintiffs have incurred expenses and sustained damages in seeking relief from these unjust assessments.

30. Plaintiffs seek damages against Defendants McNary, Pung, and Antonio for the years 1975 and 1976, against Defendants McNary, Skaggs, and Antonio for 1977, against Defendants McNary, Skaggs, Antonio, Schneider, Williams, Otto, and Snyder for 1978, and against Defendants McNary, Skaggs, Schneider, Williams, Otto, and Snyder for 1979.

Statement Of Second Claim For Relief

31. Plaintiffs J. David and Lynn F. Cassilly incorporate by reference as though fully set forth hereinbelow, paragraphs 1 through 24 of this Complaint.

32. In 1977, Plaintiffs successfully appealed their assessment to the St. Louis County Board of Equalization obtaining relief on the grounds that Defendant Antonio had valued Plaintiffs' property at a level greatly in excess of the level at which property in St. Louis County generally is assessed.

33. In the year following Plaintiffs' successful appeal, 1978, Defendants Antonio and Schneider reassessed Plaintiffs' property and revalued it upwards to the very level it had been prior to the appeal, $27,320.00.

34. In 1978, Plaintiffs again appealed their assessment; this appeal is still pending before Defendants Williams, Otto, and Snyder.

35. Plaintiffs have not yet received from Defendant Schneider notification of assessed value for 1979, but allege that they are informed and believe it will be the same as it was in 1978, $27,320.00.

36. By these reassessments of Plaintiffs' property, Defendants Antonio and Schneider discriminated maliciously, willfully, intentionally, knowlingly, systematically, and invidiously against Plaintiffs and took their property without due process of law, in violation of Plaintiffs' rights under the Fourteenth Amendment to the United States Constitution and under the Due Process guarantees of the Constitution of the State of Missouri in that:

(a) With the exception of property to which building permits were issued, there has been no reassessment of homes in St. Louis County since 1961. Plaintiffs were specifically targeted for reassessment, and were reassessed, solely because they exercised their right to appeal tax assessment as granted by law of the State of Missouri and did obtain relief from the County Board of Equalization.

(b) Thousands of other St. Louis County taxpayers, who, like plaintiffs, successfully appealed their assessments on the ground that Defendants Antonio and Schneider had valued their properties at levels greatly in excess of the level at which property in St. Louis County generally is assessed, were similarly reassessed in the year following their appeals.

37. By these reassessments of Plaintiffs' property, Defendants Antonio and Schneider maliciously, willfully, invidiously, systematically, knowingly, and intentionally violated Plaintiffs' constitutional rights as set out above in that:

(a) Throughout their tenure in office they have received copies of all appeals filed with the County Board of Equalization, and of that Board's disposition of said appeals. They have acted with respect to these appellants with full knowledge.

(b) They have made specific arangements [sic] within their office to insure that successful appellants before the County Board of Equalization will be reassessed automatically in the following year. Plaintiffs and others like them were informed by a computer-printed form letter of their reassessments. They have acted with respect to these appellants systematically and intentionally.

(c) They have willfully failed and refused to correct these practices or to prevent them from reoccuring.

38. Plaintiffs incorporate by reference as though fully set forth hereinbelow paragraphs 25, 26, and 27 of this Complaint.

39. The foregoing unlawful acts and course of conduct of Defendants McNary, Skaggs, Antonio, Schneider, Williams, Otto, and Snyder have damaged plaintiffs.

Statement Of Third Claim For Relief

40. Plaintiff FAIR was founded in 1975 as a public membership unincorporated association composed of real estate taxpayers. Its purpose was and is to promote and encourage equitable enforcement of the property tax laws in Missouri. In 1979, FAIR was incorporated pursuant to the laws of the State of Missouri as a not-for-profit corporation. Prior to its incorporation, Plaintiff FAIR had more than 2,000 members.

41. Plaintiff FAIR incorporates as though fully set forth hereinbelow paragraphs 1 through 39 of this Complaint.

42. Plaintiff FAIR has assisted its members in pursuing their administrative appeal remedies and has been involved in exten-

sive litigation on behalf of its members. FAIR has incurred expenses in the amount of $50,237.82 in the course of its efforts to obtain enforcement of the state real property tax laws on behalf of its members and has thereby been damaged in said amount.

Prayer For Relief

WHEREFORE, Plaintiffs J. David Cassilly and Lynn F. Cassilly pray for judgment on the first claim for relief as follows:

1. Against Defendants McNary, Pung, and Antonio jointly and severally in the sum of $753.00 for the year 1975, and $754.00 for the year 1976;

2. Against Defendants McNary, Skaggs, and Antonio jointly and severally in the sum of $1048.00 for the year 1977;

3. Against Defendants McNary, Skaggs, Antonio, and Schneider, Williams, Otto, and Snyder jointly and severally in the sum of $1223.00 for the year 1978;

4. Against Defendants McNary, Skaggs, Schneider, Williams, Otto, and Snyder jointly and severally in the sum of $1223.00 for the year 1979;

5. Against each of the Defendants severally for punitive damages in the sum of $25,000; and

6. For such other and further relief as the Court deems just and proper.

WHEREFORE, Plaintiffs J. David Cassilly and Lynn F. Cassilly pray for judgment on the second claim for relief as follows:

7. Against Defendants McNary, Skaggs, Antonio, Schneider, Williams, Otto, and Snyder jointly and severally in the sum of $500.00;

8. Against each of the Defendants McNary, Skaggs, Antonio, Schneider, Williams, Otto, and Snyder for punitive damages in the sum of $50,000.00; and

9. For such other and further relief as the Court deems just and proper.

WHEREFORE, Plaintiff FAIR prays for judgment on the third claim for relief as follows:

10. Against Defendants McNary, Pung, and Antonio jointly and severally in the sum of $12,920.52 for the years 1975 and 1976;

11. Against Defendants McNary, Skaggs and Antonio jointly and severally in the sum of $11,139.18 for the year 1977;

12. Against Defendants McNary, Skaggs, Antonio and Schneider jointly and severally in the sum of $14,420.07 for the year 1978;

13. Against Defendants McNary, Skaggs, Schneider, Williams, Otto, and Snyder jointly and severally in the sum of $11,758.05 for the year 1979;

14. Against all the Defendants and each of them for costs of suit and reasonable attorneys fees; and

15. For such other and further relief as the court deems just and proper.

Date: June 30, 1979

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In *Evangelical Catholic Communion, Inc.* v. *Thomas, supra,* plaintiffs sought declaratory judgment, injunctive relief and damages. The court in disposing of the equitable actions, again did not reach the issue whether an action for damages would lie.

Similarly, plaintiffs in *Hickman* v. *Wujick, supra,* and *Horn* v. *O'Chesky, supra,* were actions for equitable relief in which the respective courts did not consider the issue of damages.

Hence, none of the above-cited cases are authority for the issue before this court and should not be considered by this court as supporting a conflict among the Circuits.

Advertiser Co. v. *Wallace,* 446 F. Supp. 677 (M.D.Ala. 1978), also cited by Petitioners, while on point with the issue before this court is a lower court decision. The Fifth Circuit has not had the opportunity to consider the issue and, therefore, that Circuit may not be counted as in conflict or supporting one decision or another.

The Seventh Circuit decision, *Fulton Market Storage Co.* v. *Cullerton,* 582 F.2d 1071 (1978), *cert. den.,* 439 U.S. 1121 (1979), which may seem to be in conflict with the decision of the Eighth Circuit is devoid of certain facts with which to determine whether the opinions are in actual conflict. Nowhere is it stated in *Fulton Market* on what basis the §1983 action was premised other than general allegations regarding due process and equal protection. In contrast, the District Court decision which the Eighth Circuit affirmed, specifically held that in the circumstances *presently alleged* no cause of action would lie. The District Court's opinion recognized other circumstances in which a damage action may be available (A-7). The rejection by the Eighth Circuit of the Seventh Circuit decision is largely based on the factual allegations made by Petitioners which raise certain characteristics of the real property itself as the basis of discrimination (A-7). As Respondents have argued in Point 1 of this brief, characteristics of the property itself are an integral part of the taxation system and its implementation, and the

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-0305C(3)

Fair Assessment In Real Estate Association, et al.,
Plaintiffs,

v.

McNary, et al.,
Defendants.

MOTION BY DEFENDANTS McNARY, SKAGGS, ANTONIO, PUNG AND SCHNEIDER TO DISMISS PLAINTIFFS' COMPLAINT

Come now Defendants McNary, Skaggs, Antonio, Pung and Schneider and move the Court, pursuant to Federal Rules of Civil Procedure, Rules 12(b) and 12(h)(3), to make and enter an order dismissing Plaintiffs' complaint, for failure to state a claim for which relief may be granted, and lack of jurisdiction over the subject matter, for the reasons set forth below:

1. Plaintiff Fair Assessment in Real Estate Association lacks standing to bring this action. Plaintiffs' complaint does not allege that said association owns property in St. Louis County whose assessment was affected by the alleged actions of Defendants. Said Complaint does not allege that all of its members were affected by the alleged action of Defendants, nor are there any allegations that its interests are so related to its members as to give it standing to raise its members' rights, nor is it alleged that any of defendants alleged activities were directed toward said organization.

2. The Court lacks jurisdiction under 28 U.S.C. §1341 for the reason that Plaintiffs' Complaint would have the effect of restraining the assessment, levy and collection of taxes under state law where a plain speedy and efficient remedy may be obtained in the Missouri courts.

3. This Court should, under the principles of comity and federalism, abstain from ruling on the constitutional issues raised in this matter, for the reason that substantial issues of state law are involved, and should be considered by the Courts of Missouri, and said state court determinations may affect Plaintiffs' federal claims to a substantial degree. This Court should further abstain from a consideration of this matter, for the reason that the Missouri courts have ruled on other matters asserted in the Complaint and Plaintiffs are currently pursuing administrative and judicial remedies under Missouri law seeking relief.

4. Plaintiffs' Complaint fails to state a claim for which relief may be granted in that the allegations set forth in the Complaint (Paragraphs 15 thru 30 of the Complaint) do not state any violation of federal constitutional rights, but rather show compliance by Defendants with the assessment requirements of the Missouri Constitution, statutes and cases. Plaintiffs' complaint fails also to note the recent decisions of the Missouri Supreme Court, and the passage of legislation by the General Assembly of the State of Missouri designed to remedy the problem of assessment in the State of Missouri. Plaintiffs' complaint alleges that the Assessor is required under Missouri law to assess property at some numerical average percentage of its true value in money, which is nowhere required or even permitted by statute or the Missouri Constitution. Further, Board of Equalization reductions granted to Plaintiffs in 1977, 1978 and 1979 were clearly contrary to Missouri statutes.

5. Plaintiffs' Complaint should be dismissed for the reason that administrative and legal remedies which could afford Plain-

tiffs relief have not been exhausted, and that many of the Plaintiffs' past attempts at utilization which were unsuccessful resulted not from any actions on the part of the Defendants, but from their inability to properly prepare and present to the appropriate court or administrative body proper proof of their claims.

6. Principles of res judicata prevent Plaintiffs relitigating matters in the Complaint as the Supreme Court of Missouri has already ruled thereon.

WHEREFORE, Defendants pray that the Complaint filed by Plaintiffs herein be dismissed, and that costs be assessed against Plaintiffs in this proceeding.

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Supreme Court, U. S.
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No. 80-427

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., *et al.*,
Petitioners,

v.

GENE MCNARY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS McNARY, SKAGGS, ANTONIO, PUNG AND SCHNEIDER

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QUESTION PRESENTED

Whether the District Court erred in dismissing this action on grounds that the Tax Injunction Act, 28 U.S.C. §1341, bars a suit at law for damages under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 arising from Respondents' alleged past discriminatory practices in assessing Petitioners' property and in taxing Petitioners.

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No. 80-427

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BRIEF OF RESPONDENTS McNARY, SKAGGS, ANTONIO, PUNG AND SCHNEIDER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 622 F.2d 415. The opinion of the United States District Court for the Eastern District of Missouri is reported at 478 F. Supp. 1231. The opinion of the United States Court of Appeals is set out in Appendix A at page A-1 of Petitioners' Brief. The opinion of the United States District Court for the Eastern District of Missouri is set out in Appendix B at pages A-2 to A-9 of Petitioners' Brief.

JURISDICTION

Jurisdiction is vested in this Court pursuant to 28 U.S.C. §1254(1) because petitioner seeks by writ of certiorari a review of the judgment of the United States Court of Appeals for the Eighth Circuit, *en banc,* which was entered on June 19, 1980. The final mandate of the United States Court of Appeals for the Eighth Circuit was entered on July 15, 1978.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the proper proceeding for redress.

28 U.S.C. §1341: The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

STATEMENT OF THE CASE

Respondents adopt the Statement of the Case in Petitioners' brief with the exception of Petitioners' statement regarding the basis of the District Court's order of November 7, 1979. The order of the District Court dismissing this action was based on the Tax Injunction Act and doctrines of federal abstention.

ARGUMENT AGAINST GRANTING THE WRIT

Petitioners' characterization of the conflicts among the Circuits with respect to the issue presented is misguided and misleading. At best only two Circuits have arguably reached conflicting decisions; those of the Seventh and Eighth Circuits.

Likewise, Petitioners' conclusion as to the implications of the Eighth Circuit decision is exaggerated and an impermissible extension of a narrow District Court opinion.

1. Petitioners' first argument is essentially that the implications of the District Court ruling, which the Eighth Circuit has affirmed, is that state and local officials may impose any kind of discriminatory tax without fear that the federal courts will protect those so discriminated against. Such an interpretation of the District Court decision ignores the Court's explicit finding that petitioners "have means to rectify what they consider an unjust situation through the state's own processes." (Appendix B A-8). In particular, the District Court premised its decision on "the circumstances presently alleged" *inter alia* that petitioners based their allegations of discrimination on the fact of being real property owners with new improvements and such owners who previously protested such disparity for property tax reassessment. (A-6). The Court also explicitly recognized that different considerations would lie if plaintiffs' alleged discrimination on the basis of "race, ethnic background or political affiliation" (A-7). Implicit is the distinction between characteristics of the owners (race, ethnic background, political affiliation) as opposed to characteristics of the real property itself (new as opposed to old improvements). The characteristics of the real property itself and how it is treated by taxing officials is an integral part of the taxing system and implementation of that system. Hence, the District Court concluded that the discrimination alleged was so closely allied with the system of taxation that federal court interference would be disruptive of that system and the purpose of the Tax Injunction Act would be defeated if Petitioners' action were allowed to proceed.

In summary, the District Court's opinion first recognized that Petitioner's did have an adequate state remedy which would obviate the necessity of a federal remedy and, secondly, under the circumstances alleged as the basis of discriminatory acts by taxing officials, those characteristics are intrinsic to the real property taxation system and its implementation which the federal courts have been forbidden to entertain by the very purpose of the Tax Injunction Act. Mere invocation of 42 U.S.C. §1983 does not extinguish specific legislative bars to federal court jurisdiction. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), footnote 6.

2. Petitioners' attempt to shore, up their second argument regarding the split between the Seventh and Eighth Circuits by citing cases which do not address the issue before this Court. Cases regarding tax refunds are a species of action equitable in nature which are readily distinguishable from Petitoners' damage action for actual and punitive damages. These cases did not consider the issue before this Court and should not be considered as supporting a split of authority between the Circuits.

Petitioners' also cite *Ludwin* v. *City of Cambridge,* 592 F.2d 606 (1st Cir. 1979); *Evangelical Catholic Communion, Inc.* v. *Thomas,* 373 F. Supp. 1342 (D.Vt. 1973) aff'd 493 F.2d 1397 (2nd cir. 1974 (Mem); *Hickman* v. *Wujick,* 488 F.2d 875 (2d Cir. 1973); *Horn* v. *O'Cheskey,* 387 F. Supp. 1280 (D.N.M. 1974) for the proposition that these cases are "to the same effect" as the Eighth Circuit decision. (Petitioners' Brief 7). While Respondents believe these cases support the Eighth Circuit decision, none of these cases address the precise issue before this court.

In *Ludwin* v. *City of Cambridge, supra,* plaintiffs brought a declaratory action and sought damages. The Court in disposing of the declaratory action therein, did not reach the issue as to damages.

District Court concluded that an action premised thereon is clearly within the prohibition of the Tax Injunction act because of the disruption such suits would cause in the state's revenue and collection systems. (A-7)

This finding clearly distinguishes the Seventh Circuit's conclusion that plaintiffs' action in *Fulton Market* would not disrupt the state's ability to collect its revenue and hence would not create the harm which the Tax Injunction Act was intended to prevent. 582 F.2d. 1071, 1078.

Secondly, the Seventh and Eighth Circuit opinions differ in their respective findings regarding state remedies. The Seventh circuit decision explicitly found that state remedies available to plaintiffs were inadequate. 582 F.2d 1071, 1080. By the very language of the Tax Injunction Act, there exists a bar to federal jurisdiction only where "a plain, speedy and efficient remedy may be had in the courts of such state."

The Eighth Circuit decision affirmed the District Court's finding that petitioners have adequate state remedies, thus barring consideration by that court. (A-8)

Hence, the conclusions reached by the two Circuits are premised on factual findings which are significantly different and which make the conflict between them more apparent than real.

This court should deny its writ of certiorari and await additional consideration of the same issue by other Circuits because of the lack of clear conflict between the only two Circuits which have thus far considered the issue.

CONCLUSION

For the reasons stated above Respondents submit that a writ of certiorari should not issue.

Respectfully submitted,

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IN THE
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FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., et al.,
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GENE McNARY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS WILLIAMS, OTTO AND SNYDER IN OPPOSITION TO PETITION FOR CERTIORARI

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Argument:

I. The petition for certiorari should not be granted for the reason that the petitioners based their cause of action upon the provisions of 42 U.S.C. § 1983 since it is well established that the jurisdictional bar of 28 U.S.C. § 1341 applies equally to suits based upon the provisions of 42 U.S.C. § 1983 4

II. There is no real conflict between the decision of the United States Court of Appeals for the Eighth Circuit in the instant case and that of the United States Court of Appeals for the Seventh Circuit in the case of *Fulton Market Cold Storage Company* v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978), on the question of the applicability of the jurisdictional bar contained in 28 U.S.C. § 1341 5

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No. 80-427

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., et al.,
Petitioners,

v.

GENE McNARY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS WILLIAMS, OTTO AND SNYDER IN OPPOSITION TO PETITION FOR CERTIORARI

The brief of respondents Donald G. Williams, Tom R. Otto, and Stephen C. Snyder, is in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit filed on September 17, 1980, by petitioners Fair Assessment in Real Estate Association, Inc., J. David Cassilly and Lynn F. Cassilly.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Petitioners' Appendix A and is reported at 622 F.2d 415. The opinion of the District Court is reproduced in Petitioners' Appendix B and is reported at 478 F.Supp. 1231.

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the petitioners' characterization of their lawsuit as one based upon the provisions of 42 U.S.C. § 1983 citing interference with their property rights as an alleged result of overassessment of their real property situated in St. Louis County is sufficient to circumvent the jurisdictional bar of 28 U.S.C. § 1341.

2. Whether a concrete and significant conflict really exists between the decision of the United States Court of Appeals for the Eighth Circuit in the instant case and the decision of the United States Court of Appeals for the Seventh Circuit in *Fulton Market Cold Storage Company* v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979) regarding the application of the jurisdictional bar contained in 28 U.S.C. § 1341.

STATUTES INVOLVED

The respondents believe that the statutory provisions involved in this case have been adequately set forth in the petition.

STATEMENT OF THE CASE

On July 2, 1979, the petitioners filed this action in the United States District Court for the Eastern District of Missouri. The petitioners based their action upon the provisions of 42 U.S.C. § 1983 and sought monetary relief of alleged violations by the respondents of their Fourteenth Amendment rights. In essence, the petitioners' complaint

sought monetary relief for alleged overpayments of their taxes in the years 1975 through 1979. The petitioners contended in their complaint that they had made these overpayments due to overassessments by the respondents during these tax years. The petitioners also sought punitive damages in the sum of $25,000.00 from the respondents.

On August 13, 1979, respondents McNary, Skaggs, Antonio, Pung and Schneider, filed their motion to dismiss the petitioners' complaint with suggestions in support thereof. On August 17, 1979, respondents Williams, Otto and Snyder filed their answer to the complaint of the petitioners. In their answer respondents Williams, Otto and Snyder also moved to dismiss petitioners' complaint for failure to state a cause of action upon which relief could be granted as to them.

On September 19, 1979, the petitioners filed a memorandum in opposition to the motion to dismiss of respondents McNary, Skaggs, Antonio, Pung and Schneider. Thereafter, on October 5, 1979, respondents McNary, Skaggs, Antonio, Pung and Schneider filed a reply to the petitioners' suggestions in opposition to their motion to dismiss.

On November 7, 1979, Judge John F. Nangle of the United States District Court for the Eastern District of Missouri, Eastern Division, entered his memorandum and order dismissing the complaint of the petitioners in its entirety. In essence, Judge Nangle based his decision to dismiss the petitioners' complaint upon the provisions of 28 U.S.C. § 1341.

On June 19, 1980, the United States Court of Appeals for the Eighth Circuit, En Banc, affirmed the judgment of the District Court. No separate opinion was issued by the Court of Appeals at the time of affirmance.

ARGUMENT

I.

The petition for certiorari should not be granted for the reason that the petitioners based their cause of action upon the provisions of 42 U.S.C. § 1983 since it is well established that the jurisdictional bar of 28 U.S.C. § 1341 applies equally to suits based upon the provisions of 42 U.S.C. § 1983.

The petitioners' first reason presented for this Court to grant their petition for certiorari in this case is a rather hysterical argument that since they sought to allege a cause of action in their original petition based upon 42 U.S.C. § 1983, they should have somehow been able to avoid the jurisdictional bar of 28 U.S.C. § 1341. On the contrary, respondents Williams, Otto and Snyder submit that the fact that the petitioners' contended in their complaint that their property rights were being interferred with due to alleged overassessments of their real property in St. Louis County, and sought to base their cause of action upon the provisions of 42 U.S.C. § 1983 did not ameliorate against the application of the jurisdictional bar contained in 28 U.S.C. § 1341 to this case.

It has been held on numerous occasions that the provisions of 28 U.S.C. § 1341 apply equally to lawsuits premised upon 42 U.S.C. § 1983. The effort of the petitioners to base their lawsuit on the provisions of 42 U.S.C. § 1983 in order to circumvent the jurisdictional bar of 28 U.S.C. § 1341 simply cannot withstand scrutiny.

In the case of *Lynch* v. *Household Finance Corporation*, 405 U.S. 538 (1972) this Court recognized the position that a plaintiff may not avoid the jurisdictional bar of 28 U.S.C. § 1341 simply by alleging a cause of action pursuant to the provisions of 42 U.S.C. § 1983. In *Lynch*

v. *Household Finance Corporation, supra,* this Court cited 28 U.S.C. § 1341 as an expression of congressional intent that district courts not interfere with the collection of any tax under state law as long as a plain, speedy and efficient remedy could be had in the state courts. This position has been repeatedly supported by the lower federal courts regardless of whether a plaintiff attempts to base his cause of action upon the provisions of 42 U.S.C. § 1983 or some other federal statutory scheme. See *Coon* v. *Teasdale,* 567 F.2d 820 (8th Cir. 1977); *Mandel* v. *Hutchinson,* 494 F.2d 364 (9th Cir. 1974); *American Commuter's Association* v. *Levitt,* 405 F.2d 1148 (2nd Cir. 1969); *Flato Reality Investments* v. *City of Big Spring,* 388 F.Supp. 131 (N.D.Tex. 1975); *Kimmey* v. *H. A. Berkheimer, Inc.,* 376 F.Supp. 49 (E.D.Penn. 1974), *aff'd,* 511 F.2d 1394 (3rd Cir. 1975).

Respondents Williams, Otto and Snyder submit that there is no reason for this Court to grant the petition for certiorari in the instant case based upon the first reason presented by the petitioners. There is simply no reason for this Court to review the well-established principle discussed above upon which there is no apparent disagreement among the federal courts.

II.

There is no real conflict between the decision of the United States Court of Appeals for the Eighth Circuit in the instant case and that of the United States Court of Appeals for the Seventh Circuit in the case of Fulton Market Cold Storage Company **v.** Cullerton, **582 F.2d 1071 (7th Cir. 1978), on the question of the applicability of the jurisdictional bar contained in 28 U.S.C. § 1341.**

As their second reason for granting certiorari, the petitioners urge this Court to accept the instant case because there is a conflict between the circuits on the question of

whether or not the jurisdictional bar of 28 U.S.C. § 1341 should be applied to a case of this type. In essence, the petitioners seek to strike a conflict between the decision of the United States Court of Appeals for the Eighth Circuit in this case, and that of the United States Court of Appeals for the Seventh Circuit in the case of *Fulton Market Cold Storage Company* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978). Respondents Otto, Williams and Snyder submit that no real conflict exists between these two decisions of the Seventh and Eighth Circuit Courts of Appeal which justifies the granting of this petition.

In its opinion issued on June 19, 1980, the United States Court of Appeals for the Eighth Circuit, En Banc, merely affirmed the judgment of the District Court without issuing a separate opinion. In reaching its decision, the District Court held that although the petitioners characterized their suit as one for monetary damages, it was in reality a suit designed to obtain refunds of taxes allegedly overpaid in previous tax years due to overassessments of their real property in St. Louis County. The District Court held that the provisions of 28 U.S.C. § 1341 barred suits of the nature filed by petitioners as well as suits for entirely equitable relief in the form of injunction or declaratory judgment. In so doing, the district judge, the Honorable John F. Nangle, relied upon the decisions in *Kelly* v. *Springett,* 527 F.2d 1090 (9th Cir. 1975) and *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972), *cert. denied,* 410 U.S. 966 (1973). In reaching its result, the District Court distinguished the case of *Fulton Market Cold Storage Company* v. *Cullerton, supra,* on the ground that the *Fulton* case was clearly a cause of action for damages rather than one essentially for a tax refund. Indeed, an examination of the *Fulton Market Cold Storage* opinion reveals that the plaintiff therein was seeking $60,000.00 in unliquidated damages plus the damage to its business resulting from

the actions of the defendants therein along with punitive damages.

In reaching its decision that the petitioners' suit for a tax refund was barred by the provisions of 28 U.S.C. § 1341, the District Court reached a result consistent with that reached by the other federal courts of appeal on this issue. See *United Gas Pipe Line Company* v. *Whitman*, 595 F.2d 323 (5th Cir. 1979); *Kelly* v. *Springett, supra; United States* v. *State Tax Commission of the State of Mississippi*, 505 F.2d 633 (5th Cir. 1974); *Bland* v. *McHann, supra; Gray* v. *Morgan*, 371 F.2d 172 (7th Cir. 1966); *Evangelical Catholic Communion, Inc.* v. *Thomas*, 373 F.Supp. 1342 (D.Vt. 1973), *aff'd*, 493 F.2d 1397 (2nd Cir. 1974). As stated previously the Court of Appeals merely affirmed this result. In their petition, the petitioners are unable to cite any federal appellate court decision disagreeing with this proposition. The only cases cited by the petitioners which disagree with the position that the Tax Injunction Act bars a suit essentially for a tax refund are district court decisions. See Petition at p. 7. The petitioners' contention that this Court held "without comment" in *Ott* v. *Mississippi Valley Barge Line Company*, 336 U.S. 169 (1949) that tax refund cases are not barred by 28 U.S.C. § 1341 is simply absurd.

Respondents Williams, Otto and Snyder submit that the petitioners' attempt to obtain certiorari in this case based upon a concocted conflict between the decision of the United States Court of Appeals for the Eighth Circuit in the instant case and the decision of the United States Court of Appeals for the Seventh Circuit in the *Fulton Market Cold Storage* case must fail. The two cases are clearly distinguishable, and they did not reach divergent positions on the issue of whether or not the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, should be applied as a bar to a lawsuit which is essentially one seek-

ing a tax refund due to alleged overassessments of real property in previous tax years.

In addition, even if this Court were to construe the decision of the United States Court of Appeals for the Eighth Circuit as holding that lawsuits for unliquidated damages are barred by 28 U.S.C. § 1341, respondents Williams, Otto and Snyder submit that this is the appropriate result and does not require review by this Court. See *Advertiser Company* v. *Wallace*, 446 F.Supp. 677 (M.D.Ala. 1978); *Hickmann* v. *Wujick*, 488 F.2d 875 (2nd Cir. 1973); *Horn* v. *O'Cheskey*, 378 F.Supp. 1280 (D.N.M. 1974); *Evangelical Catholic Communion, Inc.* v. *Thomas, supra.*

CONCLUSION

For the above-stated reasons, the petition for certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM 1980

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GENE MCNARY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners reply to Respondents in order to ensure that the respective Respondents' efforts to obfuscate Petitioners' position fails. Instead of addressing whether the question presented justifies review by this Court, both sets of Respondents pressed upon the Court their separate versions of the merits in the hope of confusing both the nature of the original action and the issues at hand.

Petitioners ask this Court to determine whether the Tax Injunction Act, 28 U.S.C. §1341, bars an action at law for

damages arising out of malicious conduct by certain individuals in the course of performing their duties as state and local tax officials. Both sets of Respondents inaccurately contend that Petitioners claim a special privilege to avoid the bar of §1341 because theirs is a Civil Rights action. Petitioners do not make that claim. Petitioners contend only that the prohibitions of the Tax Injunction Act do not bar federal courts from hearing actions at law for damages.

Whether the Tax Injunction Act extends to purely legal proceedings as well as to equitable actions has never been explicitly determined by this Court. Two Circuits of the Court of Appeals have rendered conflicting decisions on the question. The Seventh Circuit ruled that §1341 does not bar suits for damages, *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978); the Eighth Circuit in affirming without opinion the ruling of the District Court in the instant action ruled the opposite. By implication, other courts have taken each side of the issue. (See Petition at 7).

Both Respondent groups deny the existence of such conflict by setting forth incorrect depictions of the relevant facts and law. The State Employee Respondents attempt to conceal that conflict by characterizing Petitioners' suit as one for a tax refund. The County Employee Respondents repudiated that characterization. And, the District Court explicitly recognized that its holding, subsequently adopted by the Eighth Circuit, conflicted with that of the Seventh Circuit on the central issue before it concerning "whether the [Tax Injunction] Act prohibits a suit for damages in the circumstances presently alleged." (Appendix B, A-6).

The County Employee Respondents attempt to conceal the conflict between the Circuits by distorting the allegations in Petitioners' complaint. The facts of the instant case are indistinguishable from those in *Fulton Market.* In fact, Petitioners' lawsuit was modeled upon that action. Like the instant

case, *Fulton Market* involved allegations of a systematic, knowing, intentional, fraudulent, and invidious failure to equalize property tax assessments. 582 F.2d at 1073. That close parallel between the two cases underscores the conflict in the legal results. Respondents cite no legal support, other than the District Court opinion at issue, for the proposition that federal courts should apply §1341 differentially according to the type of discrimination alleged. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), speaks the contrary.

The County Employee Respondents' focus upon the basis of the alleged discrimination misses the point of this lawsuit. These Respondents suggest that discrimination based upon the characteristics of property involves the essence of the state taxation system. Yet, Petitioners do not challenge or seek to disrupt the bureaucratic operation of the taxing system; Petitioners' complaint concerns only the calculated, malicious misconduct of some individuals who, operating under the color of the state law, have wrongfully damaged Petitioners. Contrary to Respondents' representations, the Seventh Circuit in like circumstances rejected the notion that an action for damages disrupts the taxation system. *Fulton Market*, 582 F.2d at 1078.

Similarly, the County Employee Respondents' contention that the two appellate cases are not parallel as to the matter of available state remedies wholly misstates the holding of the Seventh Circuit. That court did not even consider the quality of state remedies in determining that §1341 does not bar legal proceedings for damages.

In sum, Petitioners seeks this Court's determination of a question that has been resolved inconsistently by the federal appellate courts and that bears significance undenied by Respondents.

Respectfully submitted,

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OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., J. DAVID CASSILLY, and LYNN F. CASSILLY,

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GENE MCNARY, WILLIAM A. SKAGGS, EDMUND J. PUNG, CHARLES T. SCHNEIDER, FRANK J. ANTONIO, DONALD G. WILLIAMS, TOM R. OTTO, and STEPHEN C. SNYDER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the District Court erred in dismissing this action on grounds that the Tax Injunction Act, 28 U.S.C. §1341, bars a suit at law for damages under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 arising from Respondents' past discriminatory practices in assessing Petitioners' property and in taxing Petitioners.

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Breckenridge Hotels Corp. v. Leachman, 571 S.W.2d 251 (Mo. 1978) (*en banc*) 5,14,37

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Carey v. Piphus, 435 U.S. 247 (1978) 13

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Tenney v. Brandhove, 341 U.S. 367 (1951) 36

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United Gas Pipe Line Co. v. Whitman, 595 F.2d 323 (5th Cir. 1979) 28

United States v. Dorgan, 522 F.2d 969 (8th Cir. 1975), *on remand,* 413 F. Supp. 173 (D.N.D.), *aff'd,* 429 U.S. 953 (1976) 32

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28 U.S.C. §1341 8,9,13,15,22,25,26,27,28,29,33,34

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Other Authorities

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and the Federal System* (2d ed. 1973) 21

Note, *Developments in the Law: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133 (1977) 37

42 Cong. Rec. 4846 (Apr. 17, 1908) 24

46 Cong. Rec. 312 (Dec. 14, 1910) 25

78 Cong. Rec. 1915 (Feb. 5, 1934) 24

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H.R. Rep. No. 1503, 75th Cong., 1st Sess. (1937) 20,21

Sen. Rep. No. 1584, 62d Cong., 3d Sess. (1913) 25

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Sen. Rep. No. 1035, 75th Cong., 1st Sess. (1937) 17,19,22

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On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 622 F.2d 415, Pet. App. A-1 to A-2. The opinion of the United States District Court for the Eastern District of Missouri is reported at 478 F.Supp. 1231, Pet. App. A-3 to A-9.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, *en banc,* was entered on June 19, 1980, affirming the judgment of the United States District Court for the Eastern District of Missouri, entered on November 7, 1979. The final mandate of the United States Court of Appeals for the Eighth Circuit was entered on July 15, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The Petition for Writ of Certiorari was filed on September 17, 1980 and granted on April 6, 1981.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1341: The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. §1342: The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the proper proceeding for redress.

Missouri Constitution, Article X, Section 3: Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this constitution, the methods of determining the value of property for taxation shall be fixed by law.

Mo. Rev. Stat. §137.080: Real estate and tangible personal property shall be assessed annually at the assessment which commences on the first day of January.

STATEMENT OF THE CASE

Since 1961, residential property in St. Louis County, Missouri has not been systematically reassessed for real estate tax purposes. J.A. 7. In 1961, the last such assessment was completed. J.A. 7.

As a technical matter, residential property on the Assessor's books is reassessed each year. Mo. Rev. Stat. §137.080. However, in the absence of a systematic reassessment process, the previous year's assessment is ordinarily carried forward to

the current year. Thus, by 1977, the average assessed value of property in St. Louis County was 22.2% of the average value at which it would have been appraised, had that been done at current fair market value (the "appraised value"). J.A. 7.

Since at least 1974, Respondent Frank J. Antonio, the Assessor for St. Louis County and his successor in February 1978, Charles T. Schneider (together, the "Assessors"), placed new homes, including that of Petitioners J. David Cassilly and Lynn F. Cassilly (the "Casillys"), on the assessment books for St. Louis County at 33 1/3% of the homes' appraised values at the time of their initial assessment. J.A. 5, 8. Thus, the Assessors have adopted a practice of permitting older properties to be assessed at some 22% of their current true market values while they assess new homes at 33 1/3% of their current true market values.

Notwithstanding this practice, the Assessors have long acknowledged the need for reassessment. J.A. 8. They have collected information and made monthly reports to the State Tax Commission showing the percentage proportion of assessed values of older homes to their sales prices; and these percentages have progressively declined. J.A. 8. They were told by the Missouri State Auditor in a 1975 report that average assessed values were 22.8% of average sales prices in 1974. J.A. 8. They were told in a State Tax Commission sponsored report that average assessed values were 22.2% of average appraised values in 1977. J.A. 8. But they did not reassess, and they did not adjust the assessments of new property so that they would be roughly comparable to the assessments of property throughout the county.

In 1975, Petitioner J. David Cassilly and others initiated a lawsuit seeking reassessment. As a result, the state circuit court ordered Respondent Antonio to reassess all real property located in St. Louis County. *State ex rel. Cassilly* v. *Riney,* No. 374450, Div. 5. (St. Louis County, Mo., Cir., Aug. 17, 1977, *on*

rehearing, Sept. 26, 1977). On direct appeal, the Missouri Supreme Court reversed the court's order for reassessment on grounds that the State Tax Commission should supervise the process. *State ex rel. Cassilly* v. *Riney*, 576 S.W.2d 325 (Mo. 1979)(*en banc*). In so holding, however, the court stated that the stipulated facts manifested a violation of a Missouri constitutional provision analogous to the Equal Protection Clause of the Fourteenth Amendment as it applies to taxation. *Id.* at 328, *citing* Mo. Const. Art. X, §3.

Contemporaneously, the owner of a St. Louis County hotel appealed the January 1975 assessment of a new hotel facility at 33 1/3% of its 1975 fair market value while the prevailing assessments at that time for other, older property in the County were significantly lower than the 33 1/3% of fair market value. The Missouri Supreme Court ruled that the Assessors were required to make an adjustment in assessing the new property so that it would be assessed in a manner that did not consistently discriminate against owners of newly constructed property. *Breckenridge Hotels Corp.* v. *Leachman*, 571 S.W.2d 251, 252 (Mo. 1978) *(en banc), citing Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 445-47 (1923).

The Cassillys' New Home

The Cassillys purchased their new St. Louis County home from a builder in 1974. J.A. 5,6. For the tax year 1975, Respondent Antonio assessed the home at $27,320.00, an amount that was approximately 33 1/3% of the then current true market value of the home. J.A. 6. In 1975 and 1976, the Cassillys paid real estate taxes based upon that assessment without appeal. J.A. 6. In 1977, they were again assessed at the same level but appealed that assessment to the County Board of Equalization. The Board reduced the assessed value to an amount that was approximately equal to 29% of the 1975 true market value. J.A. 6-7.

In 1978, the Assessor raised the assessed value of the property from the amount to which it had been lowered by the Board of Equalization in the previous year to the previous assessed level—$27,320.00. J.A. 7. The Cassillys again appealed their assessment; that appeal was still pending at the commencement of this lawsuit. At the time of commencement of the lawsuit, the Cassillys had not been notified of their assessed value for 1979, but they were informed and believed that it would be the same as the assessed value in 1978. J.A. 7.

As a result of these assessments, the Cassillys were taxed on the subject property $2,253.90 for 1975, $2,256.63 for 1976, $1,956.44 for 1977, and $2,378.21 for 1978. J.A. 6-7. Had their property been valued during the period 1975-79 at the average rate of 22.2%, the assessed value of the property would have been $18,195.00. Based upon that valuation, their taxes would have been $1,501.00 for 1975, $1,503.00 for 1976, $1,508.00 for 1977, and $1,443.00 for 1978.

This Lawsuit—The Cassillys' Claims

On July 2, 1979, Petitioners initiated the instant lawsuit in which the Casillys made the following allegations:

Assessing the Cassillys' property at 33 1/3% of its current true market value while permitting other property to be assessed at a considerably lower percentage of true market value constituted an invidious discrimination against them and a deprivation of property without Due Process of law, in violation of the Fourteenth Amendment to the United States Constitution and analogous portions of the Missouri Constitution. J.A. 7.

The Assessors engaged in a practice of reassessing property that had been assessed downward in cases in which property owners had appealed their prior assessments to the St. Louis County Board of Equalization.

The Assessors did this to the Cassillys in 1978 and 1979, and as a result the Assessors discriminated invidiously against the Cassillys and took their property without Due Process of law in violation of their rights under the Fourteenth Amendment to the United States Constitution and analogous portions of the Missouri Constitution. J.A. 11.

Respondent Gene McNary, who at all relevant times was the supervisor of St. Louis County, together with Respondent Edmund J. Pung, Director of Revenue of St. Louis County and his successor in 1977, Respondent William A. Skaggs (J.A. 5), had supervisory responsibility over the operations of the Assessors and, with knowledge, directed and acquiesced in the operations of the Assessors and the policies they were carrying out. Respondents Donald G. Williams, Steven C. Snyder, and Tom R. Otto were members of the State Tax Commission through at least March 1, 1979 (J.A. 5) and exercised general supervisory responsibility over the Assessors and participated in the execution of the policies of the other Respondents. J.A. 9.

The Respondents' conduct violated clearly established constitutional rights. The various Respondents acted maliciously, willfully, intentionally, knowingly, systematically, and invidiously against the Cassillys. J.A. 8, 9-10.

Each Respondent was individually liable, according to the particular years that he was involved in imposing the excessive assessments for damages in an amount that equalled the excessive taxes imposed, together with the Cassillys' expenses and damages suffered in seeking relief from unjust assessment and punitive damages. J.A. 10, 13-14.

This Lawsuit—FAIR's Claims

The Cassillys were joined in their Complaint by Fair Assessment in Real Estate Association, Inc. ("FAIR"), a not-for-profit membership corporation formed by real estate taxpayers in St. Louis County to promote equitable enforcement of real

estate property tax laws in the State of Missouri. J.A. 4. FAIR based its claim, the third claim for relief, upon its representational work on behalf of St. Louis County taxpayers. J.A. 12-13. Because of the district court's disposition of the case, no matter related to FAIR's claim has been disposed of and none is presented for review.

The Decisions Below

This action was initiated on July 2, 1979. On August 13, 1979, Respondents McNary, Skaggs, Pung, Schneider, and Antonio filed their joint motion to dismiss Petitioners' Complaint for failure to state a claim upon which relief may be granted and for lack of jurisdiction over the subject matter. On August 16, 1979, Respondents Williams, Otto, and Snyder filed an answer generally denying the allegations of Petitioners' Complaint.

After considering the pleadings, suggestions, and memoranda filed by the various parties, and without the introduction of evidence or oral argument, the district court entered its order on November 7, 1979, dismissing this action in its "entirety," on the basis of the Tax Injunction Act, 28 U.S.C. §1341. Petition for Certiorari, Appendix A-3 to A-9 (hereinafter referred to as "Pet. App. ____"). While the district court explored only the theories of the Cassillys, it dismissed FAIR's claims since it "is obviously in the same position as the individual plaintiffs." Pet. App. A-8. Therefore, without prejudice to FAIR's rights, the arguments here, as in the Court of Appeals, address only the Cassillys' rights.

On June 19, 1980, the Eighth Circuit Court of Appeals filed an order, without opinion, affirming the judgment of the district court, upon an equally divided vote of the en banc court. Pet. App. A-1 to A-2.

SUMMARY OF ARGUMENT

I

Petitioners alleged that the Respondents individually, acting under color of state law, have violated the Cassillys' rights to Equal Protection of the law and Due Process of law under the Fourteenth Amendment to the United States Constitution in their assessment of the Cassillys' home. In addition, Petitioners alleged damages resulting from these abridgements of their rights and prayed for compensation based upon those injuries. This should be sufficient to state a claim upon which relief may be granted. Petitioners have gone further to allege that the rights violated were clearly established constitutional rights and that Respondents maliciously, willfully, intentionally, knowingly, systematically, and invidiously imposed these assessments. Thus the allegations concern conduct that is beyond the protection of the Respondents' qualified immunity. Under the circumstances, the Cassillys have stated a claim upon which relief may be granted, and the District Court erred in dismissing this action, unless the Tax Injunction Act, 28 U.S.C. §1341, bars all such actions at law for damages.

II

The language of the Tax Injunction Act is plain and unambiguous: It bars federal courts from enjoining, suspending, or restraining the assessment, levy, or collection of state taxes. It does not bar federal courts from hearing Petitioners' action at law for damages. Applying the classical prescription for statutory interpretation, the first issue for determination is whether the language of the Act bars Petitioners' action. Since it does not and since the legislative history is consistent with the plain language of the Act, the Court should let the Act have its own, unambiguous meaning. The Tax Injunction Act does not bar this action.

III

The legislative history of the Tax Injunction Act shows that it was not enacted for purposes of barring actions like Petitioners', at law for damages. The purpose of the Act was to block nonresidents of a state from using federal courts to interfere with states' orderly procedures for assessing and collecting taxes, hearing orderly appeals in disputes over tax liabilities, and paying refunds when taxing was inappropriate. The purpose of the Act was to limit the use of the equity power of federal courts. It was to ensure that the federal courts, in exercising their equity jurisdiction, would not grant injunctions where adequate remedies exist either within the state courts or at law within the federal courts. It was not to bar recovery of damages in appropriate cases.

The legislative history of the Johnson Act, 28 U.S.C. §1342, whose language served as a model for the Tax Injunction Act, and of bills in Congress that were predecessors to both Acts, reveals that the purpose of the Tax Injunction Act was to bar the use of federal equity jurisdiction to disrupt state administrative processes. Such purposes are fully achieved without barring Petitioners' action. Petitioners seek damages relating to taxes they have already paid. Petitioners seek those damages not from the public treasury, but from the resources of those alleged to have willfully and maliciously injured them.

IV

Judicial precedent shows that the bar of the Tax Injunction Act is restricted to equity actions for injunctions, and to no others. Early in the life of the Act, the Court considered whether it extended to bar federal jurisdiction in actions for declaratory judgment. While finding that common law principles of federal equity jurisdiction barred such suits in appropriate instances, the Court refused to find that the Tax In-

junction Act imposed such a bar. *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293 (1943). The Court has never modified that position.

Beyond declaratory judgments, the Court has not expressly addressed whether the jurisdictional bar of the Act extends to suits other than injunctions. The district court in this case ruled that this was a tax refund case and that the Act barred such cases. Nevertheless, the lower courts are split on the subject, and if anything, the Court has impliedly ruled that the Act does not bar tax refund cases from federal court. Regardless, the arguments that might permit an extension of the Act's jurisdictional bar to declaratory judgment and tax refund actions do not support the further stretching of the Act to bar actions for damages. Actions like the present one, addressed against individuals for their malicious conduct and seeking damages individually, does not threaten the states' coffers.

Absent a compelling reason arising out of the language or history of the Act for it to bar actions at law for damages, the Court should recognize that the public interest in permitting citizens to pursue protection of their constitutional rights through §1983 actions weighs against any argument for stretching the Act to create that bar. All pronouncements by the Court on the subject have recognized the equity—as opposed to law—nature of the subject of the Act. The Court should now determine that the Act does not bar actions like Petitioners' at law for damages.

V

Some kinds of federal suits might very well interfere with state tax administration. However, this action for damages does not so threaten. Because the action is against public officials, the concern for tax administrators' protection expressed by some courts below is the same concern that is expressed for other public officials. That concern has spawned development

of qualified and absolute immunities for public officials as a matter of federal law.

Tax administrators have a qualified immunity. The exception to the immunity applies where, as Petitioners have alleged here, the officials have acted maliciously, in violation of clearly established rights. The immunity provides the protection that state tax authorities require to guarantee their free exercise of judgment. Extending the Tax Injunction Act to bar this action for damages in the light of doctrines of immunity for public officials would do nothing less than protect those officials from their bad faith violation of citizens' constitutional rights. The Court need not decide that the Act goes so far. It should not.

ARGUMENT

1. Unless The Tax Injunction Act Bars Their Action For Damages, Petitioners Have Stated A Claim Upon Which Relief May Be Granted.

Aside from whether the Tax Injunction Act, 28 U.S.C. §1341, bars their action, Petitioners have stated a claim for damages upon which relief may be granted. Petitioners have alleged that the various individual Respondents, acting under color of state law, have violated Petitioners' Equal Protection and Due Process rights under the Fourteenth Amendment to the United States Constitution. J.A. 7, 11. This is sufficient to state a claim under 42 U.S.C. § 1983 upon which relief may be granted. *Gomez* v. *Toledo,* 446 U.S. 635, 640 (1980); *Monroe* v. *Pape,* 365 U.S. 167, 171 (1961). Petitioners have gone a step further and alleged that the various Respondents' conduct was malicious, willful, intentional, systematic, and invidious. J.A. 8, 9, 10.

In addition, Petitioners have alleged economic injury to themselves in the form of excessive taxes and expenses and damages sustained in efforts to avoid the unjust assessments causing these excessive taxes. J.A. 10. They have prayed for compensation for these injuries. J.A. 13-14. The Court in *Carey* v. *Piphus,* 435 U.S. 247, 253-57 (1978), held that principles of compensation should govern damage awards in §1983 cases. The allegations in this Complaint are consistent with those principles. Therefore, this is a proper action for damages arising out of a §1983 claim.

By refusing to adjust the Cassillys' assessment, or cause it to be adjusted, to the percentage of assessed value to appraised value prevailing throughout St. Louis County during the subject time periods, the Respondents violated consitutional rights that had been clearly established since the Court's decision in *Sioux City Bridge Co.* v. *Dakota County,* 260 U.S. 441 (1923). There the Court ruled that there would be a violation "of the unifor-

mity clauses of state statutes and constitutions, and of the equal protection clause of the 14th Amendment" if some taxpayers' property is assessed at a significantly higher proportion of fair market value than others. *Id.* at 446. To avoid the violation, either "the great mass of underassessed property in the taxing district" must be raised to the level at which the complaining taxpayer is assessed, or the complaining taxpayer's assessment must be "reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute." *Id. See also Sunday Lake Iron Co.* v. *Wakefield Township,* 247 U.S. 350, 353 (1918); *Greene* v. *Louisville & Interurban Railroad Co.,* 244 U.S. 499, 516-18 (1917). The principle was specifically brought to the attention of the Respondents by the Missouri Supreme Court in *Breckenridge Hotels Corp.* v. *Leachman,* 571 S.W.2d 251, 252 (Mo. 1978) (*en banc*).

By establishing that Respondents' conduct is contrary to a clearly established constitutional right, Petitioners may be able to prevail in a trial on the merits—notwithstanding Respondents' qualified immunity—merely by showing objectively that Respondents engaged in this conduct knowingly. As the Court said in *Wood* v. *Strickland,* 420 U.S. 308, 321 (1975):

> The official himself must be acting sincerely and with a belief that he is doing right, but an act violating [a complainant's] constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with [the public responsibility] than by the presence of actual malice.

Regardless of whether Respondents acted in violation of clearly established constitutional principles, it may develop after discovery and trial on the merits that Respondents have, in fact, been guilty of actual malice, for Petitioners have also alleged that Respondents' conduct was malicious, willful, intentional, systematic, and invidious. J.A. 8, 9, 10.

Thus, Petitioners have stated facts that, in light of the law since at least 1923, support their claim that their Fourteenth Amendment rights were violated and that they have a right to recover damages. The allegations are there; the quetion is whether they will be proven. For purposes of reviewing the district court dismissal, these allegations should be taken as true. *E.g., Scheuer* v. *Rhodes,* 416 U.S. 232 (1974).

Unless the Tax Injunction Act stands as a bar to the enforcement of Petitioners' rights by the federal courts, the matter should be remanded for trial on the merits. Resolution of that question, as the Court said in *Rosewell* v. *LaSalle National Bank,* ____ U.S. ____, ____, 101 S. Ct. 1221, 1228 (1981), is one of statutory construction. Examination of the plain language of the statute, its legislative history, and its historic judicial treatment shows that the Act does not bar the action.

II. The Plain Language Of The Tax Injunction Act Bars Only Suits For Injunctions, Not Actions For Damages.

The Tax Injunction Act provides as follows:

> The district courts shall not *enjoin, suspend or restrain* the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. 28 U.S.C. §1341 (emphasis supplied).

In discerning the meaning of a statute, the starting point must be the language of the statute, *e.g., Owen* v. *City of Independence,* 445 U.S. 662, 635 (1980), and where that language is plan and umambiguous, that is ordinarily the end of the inquiry. *Rubin* v. *United States,* ____ U.S. ____, ____, 101 S. Ct. 698, 701 (1981); *T.V.A.* v. *Hill,* 437 U.S. 153, 184 n.29 (1978). On its fact, the Tax Injunction Act does not prohibit the district courts from awarding money damages to redress the previous willful deprivation of federally protected rights by state officials

in the assessment, levy, or collection of state taxes. If actions for damages were intended to be barred, "one would expect to find some mention of it." *Rosewell* v. *LaSalle National Bank*, ___ U.S. ___, ___, 101 S. Ct. 1221, 1234 (1981). There is no such mention. Instead, the unambiguous terms of the Act foreclose only the issuance of injunctions.

The Court has never before expressly endeavored to define the phrase establishing the jurisdictional bar. However, its characterization of the statute has consistently demonstrated adoption of a general meaning restricting the prohibition to injunctions. *See, e.g., Rosewell*, ___ U.S. at ___, 101 S. Ct. at 1228: "The Tax Injunction Act generally prohibits federal district courts from *enjoining* state tax administration . . . ." (Emphasis supplied.) Such interpretation naturally follows not only from the individual words in the statute, but from the structure in the sentence, which paraphrases the traditional standard for determining when equitable relief is available. *See, e.g., Matthews* v. *Rodgers*, 284 U.S. 521, 525 (1932).

Although unnecessary where the language is plain and unambiguous, it is often useful to examine the available aids to statutory construction. *See, e.g., Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10-11 (1976). If the clear language and the legislative history are in accord, the Court need not examine the policy considerations underlying the statute. *Aaron* v. *Securities & Exchange Commission*, 446 U.S. 680, 695 (1980). It follows that where, as here, the language of the statute is readily discernible and sensible, and consistent with the legislative history, the Court should let the Act have its own, unambiguous meaning.

Petitioners in this case do not seek an order from the district court that is prohibited by the statute; they do not seek to "enjoin, suspend or restrain" the exercise of duty by the taxing authorities of the State of Missouri or St. Louis County. Rather, Petitioners seek damages from those individuals, who

under the color of state law, maliciously and willfully caused Petitioners damage by depriving them of their constitutional and legal rights to Due Process and Equal Protection under the Fourteenth Amendment. The statute's meaning is plain, and it does not apply to bar the action here.

III. The Legislative History Of The Tax Injunction Act Indicates That The Act Does Not Bar Petitioners' Action For Damages.

"[T]axes are the life-blood of government, and their prompt and certain availability an imperious need." *Bull* v. *United States,* 295 U.S. 247, 259 (1935). If the courts may be used to enjoin the collection of taxes until disputes over liability for them are resolved, private parties would thereby be afforded the wherewithal to cripple governments. As a result, the states have often set up procedures that require taxpayers who dispute tax liability to pay the tax to the government and test the question of their liability in actions for a tax refund. Sen. Rep. 1035, 75th Cong., 1st Sess. 1 (1937). *See, e.g.,* state laws described in *Great Lakes Dredge & Dock Co.,* 319 U.S. 293, 296-97 (1943); *Matthews* v. *Rodgers,* 284 U.S. 521, 529 (1932).

A. Statements in the Senate.

With this in mind, on February 19, 1937, Senator Bone of Washington introduced what ultimately became the Tax Injunction Act. In his introductory remarks, he explained the necessity for the legislation, saying that

> [t]he existing practice of the Federal courts to entertain tax-injunction suits makes it possible for foreign corporations [exercising the diversity jurisdiction of the federal courts] to withhold from a State and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt State and county finances, and thus make it possible for such corporations to determine for

> themselves the amount of taxes they will pay. 81 Cong. Rec. 1415, 1416 (Feb. 19, 1937).

In support of his argument for the necessity of the legislation, Senator Bone had reprinted in the Congressional Record a letter from an Assistant Attorney General of the State of Washington. That author stated that restricting taxpayers to actions on refunds rather than injunctions

> makes it possible for the State and its various agencies to survive while long drawn out tax litigation is in progress. But if those to whom the Federal courts are open may secure injunctive relief against offensive taxes, we have presented the highly unfair situation of the ordinary citizen being required to pay first and then litigate, while those privileged to sue in the Federal courts need pay only what they choose and withhold the balance during years of litigation. *Id.*

Senator Bone and his supporters were concerned that the revenues of the State would be interfered with if the federal courts were to enjoin the collection of taxes pending the outcome of disputes over the liability therefor. Senator Bone and his supporters were bothered by the unfairness of allowing foreign corporations—especially the railroads—to obtain such injunctions in federal court through diversity jurisdiction when the state's own citizens were barred from such relief.

Senator Bone and his supporters were not worried about the possibility that a citizen might be able to sue a state tax official for damages where that tax official has in bad faith violated the constitutional rights of the citizen.

The Senate Judiciary Committee expressed similar concerns about deleterious interference with state revenues by foreign corporations. In its report, it said:

It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies to survive while long-drawn-out tax litigation is in progress. If those to whom the Federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation.

The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy. Sen. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937).

These purposes expressed by the Senate Committee report are unrelated to Petitioners' case. And applying the Tax Injunction Act as a bar to Petitioners' case would not further these purposes in any way.

B. Statements in the House.

The House, in the report of the House Judiciary Committee, incorporated the Senate Report verbatim and thereby, presumably, the Senate Committee's purposes. H.R. Rep. No. 1503, 75th Cong., 1st Sess. 1-2 (1937). In its report, the House Committee also reprinted a legal opinion that it apparently adopted—an opinion that implies the Tax Injunction Act would not bar suits such as tax refund suits, assuming the proper jurisdictional prerequisities. See, for example, the following:

> You ask for some assistance on the question of whether the existence of an adequate remedy at law or in equity in the State courts, such as a tax-refund action, would prevent a foreign corporation pursuing the same remedy in the Federal court. In answer, will say [*sic*] that there might be circumstances under which the Federal courts would have no jurisdiction of such actions; for instance, where the refund action could be brought only against the State, or against the State officers under such circumstances as to amount to a suit against the State. Under the eleventh amendment to the Federal Constitution, of course, suits against the State, or suits which are in effect suits against the State, are not maintainable in the Federal courts.
>
> But if the refund action is permitted by State legislation or rules of decision against counties or county officers, and the money refunded has not yet reached the State exchequer, such actions, if maintainable in the State courts, could likewise be pursued in the Federal courts if the requisite elements of Federal jurisdiction existed. *Id.* at 2-3.

Thus, the House Committee manifested its purpose as barring actions that would interfere with the state's ability to collect revenue, and it indicated that it anticipated the continued availability of suits such as tax refund suits where the proper jurisdictional grounds lay—be they diversity of citizenship or matters of a federal question, such as §1983 actions.

That legal opinion also suggested the absence of any intent to bar actions at law in district courts. The contemporaneous equity practices precluded federal courts from enjoining state statutes only where a remedy at law existed in the *federal* courts. The proposed legislation merely added the availability of a remedy at law or equity in the *state* courts as a basis for precluding the exercise of federal equity jurisdiction. As a result, a foreign corporation could no longer obtain federal equitable relief merely by claiming the absence of a legal remedy in the federal court, so long as a legal or equitable remedy was available in the state court. *Id.* at 3-4. The state remedy was not meant to supplant remedies at law in the federal courts.

That the legislation was not directed at the abrogation of federal jurisdiciton over actions at law is confirmed by the opinion's adoption of the following quotation from *Matthews* v. *Rodgers:*

> Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a State or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the State courts, from which the cause may be brought to this Court for review if any Federal question be involved (Judicial Code, sec. 237, U.S.C. title 28, sec. 344), or to *his suit at law in the Federal courts* if the essential elements of Federal jurisdiction are present. *Id.* at 4, *quoting Matthews,* 284 U.S. at 525-26 (emphasis supplied).

C. Inferences Drawn from the Congressional Action.

It is no accident that the statute speaks only of barring equitable remedies. The lawmakers acted at a time before the merger of law and equity in the federal courts. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and*

the Federal System 664-65 (2d ed. 1973). They intended suits at law to survive the jurisdictional bar. Had they intended otherwise, they would have said so. *Cf. Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, ____, 101 S. Ct. 1221, 1234 (1981).

The Tax Injunction Act sought to fortify state legislative structures designed to protect state revenues by placing the financial onus of tax disputes on the taxpayers. *See* Sen. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). The Act restored the vitality of the state "pay now, sue later" policies and rejected the devastating "sue now, pay later" device of federal injunctions to delay interminably state tax collections. The legislative history evidences no intent to insulate all things tax-related from every possible influence of the federal courts. Only the concrete barriers to the states' prompt and certain receipt of income—barriers that were erected by injunctions—were meant to fall.

D. Histories of Related Congressional Action.

Examination of the Tax Injunction Act's broader historical context confirms these conclusions. The Tax Injunction Act was not enacted in isolation, solely as a response to the special needs of state tax administration. Rather, it was part of a general movement to constrict the injunctive powers of the federal courts, particularly in relation to the states. The Court has recently acknowledged that

> [t]he Tax Injunction Act was only one of several statutes reflecting congressional hostility to federal injunctions issued against state officials in the aftermath of this Court's decision in *Ex parte Young*. *Rosewell* v. *LaSalle National Bank*, ____ U.S. at ____, 101 S. Ct. at 1233 n.28 (citation omitted).

Three years before the passage of §1341, Congress enacted the Johnson Act, 28 U.S.C. §1342, which provides in pertinent part:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a ratemaking body of a State political subdivison, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> . . . .
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

Because the Tax Injunction Act was expressly modeled upon the Johnson Act, 81 Cong. Rec. 1416 (Feb. 19, 1937), the legislative history of the latter statute is particularly instructive. *See Rosewell* v. *LaSalle National Bank*, ____ U.S. at ____, 101 S. Ct. at 1229 (1981).

Examination of the Johnson Act and its legislative history reveals the same emphasis on disruptive injunctions as found in the Tax Injunction Act and its legislative history. The avowed aim of the legislation was to take away the advantage derived by public utility companies, predominantly foreign corporations, from access to the district courts under diversity jurisdiciton that was unavailable to residents of the state. Sen. Rep. No. 125, 73d Cong., 1st Sess. 3 (1933). The legislators were concerned about the ability of these public utilities to use federal injunctions to tie up state ratemaking processes.

The Senate Judiciary Committee Report depiction of the evils sought to be redressed by the proposed legislation has no relevance to an action for damages by two private individuals and a not-for-profit corporation, not directed against the public treasury and preceded by the state's undisturbed assessment, levy, and collection of its taxes: Foreign "monopolistic corporations" were able to evade the operation of state rate orders by

obtaining interlocutory federal injunctive relief. Because the federal courts tried the issues de novo, without regard to prior investigations and expert testimony in the state commissions, such cases remained pending for many years before their ultimate resolution, and all the while with injunctions barring enforcement of the states' orders. *Id.; see* 78 Cong. Rec. 1915-17 (Feb. 5, 1934).

In the meantime, according to the description in the Senate Report,

> the people for whose benefit the original order is made have nearly all died of old age; the order when finally entered may have no application whatsoever to the conditions existing at the time the order is entered. . . . The real object [of the public utilities] is to wear [their] opponents out by delay; the real object is not to get justice, but to prevent justice being done to them. Sen. Rep. No. 125, 73d Cong., 1st Sess. 8 (1933).

It was the "intolerable, interminable delays" to the implementation of state regulatory policies caused by federal injunctive relief that the Johnson Act sought to cure. *Cf. Perez* v. *Ledesma,* 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part) (preclusion of federal injunctions affecting state taxes prevents tax evasion and invasion of state budget).

Prior to enactment of the Johnson Act and the Tax Injunction Act, Congress had debated numerous proposals to contain federal equity jurisdiction. For example, in 1908, the Senate debated a variety of legislative proposals designed to "protect the States against the irresponsible granting of injunctions by Federal judges restraining the operation of State statutes." 42 Cong. Rec. 4852 (Apr. 17, 1908). One approach to alleviate the problem foreshadowed §1341:

> [N]o restraining order or writ of injunction shall be issued by any judge or court restraining the assessment or collection of any State, county, municipal, or district tax. 46 Cong. Rec. 312 (Dec. 14, 1910).

Debate on that proposal was deferred until consideration of the section of the bill relating to injunctions, and apparently the proposal was not discussed again in that session of Congress. *See id.* at 312-13.

Again, the discussion was substantively linked to the considerations underlying enactment of the Johnson Act and the Tax Injunction Act:

> The circuit courts of the United States and district judges sitting as circuit court judges have been in the habit recently of issuing *injunctions* the purpose of which was to *restrain and enjoin* State officers from putting into operation and effect certain State laws. The consequence has been that the interpretation of these laws has been taken, in the first instance, into Federal court, and in many instances the operation of these laws has been held up almost indefinitely by the action of an inferior Federal court. *Id.* at 313 (emphasis supplied). *See also* Sen. Rep. No. 1584, 62d Cong.,3d Sess. 1 (1913).

The Tax Injunction Act and its companion, the Johnson Act, are two products of a broad movement in Congress to contain the equitable powers of the district courts in relation to the states. Analysis of those acts in no way suggests a congressional intent to impose a similar limitation upon the district courts' jurisdiciton in actions at law. Absent a clear statement in the legistlative history supporting the conclusion that §1341 was to apply to damage actions, there is no justification for including damage actions within the class of actions barred by §1341. *Cf. Monell* v. *New York City Department of Social Services,* 436 U.S. 658, 701 (1978) (exclusion of cities from "persons" under §1983 not justified absent clear statement in legislative history).

IV. Consistent Extension Of The Precedents Dictates That The Tax Injunction Act Does Not Bar Petitioners' Action For Damages.

The Court has not previously considered the application of §1341 to an action at law for damages. It has considered its applicability to declaratory judgment actions and, perhaps, tax refund actions. Analyses in those areas suggest that, at the least, the Act should not be stretched to bar actions at law for damages.

A. Declaratory Judgment Suits.

Consider the Court's first treatment of the application of §1341 to actions for declaratory judgment. That was in *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293 (1943). There, the plaintiffs had requested a district court to declare the application of the Louisiana Unemployment Compensation Law to plaintiffs and their employees unconstitutional. As applied by Louisiana, the law would exact payment of an unemployment tax from Plaintiffs. The question considered was whether the district court could enter a declaratory judgment involving the constitutionality of a state tax statute; the Court said it could not.

In analyzing the question, the Court recognized, in dictum, that "the statutory demand [of §1341 may] be deemed restricted to prohibition of injunctions restraining collection of taxes," 319 U.S. at 301. The Court did not premise the unavailability of federal jurisdiction upon the Tax Injunction Act. Instead, it ruled that declaratory judgments are in the nature of equitable relief, subject to the Court's exercise of discretion to grant or withhold relief upon traditional equitable grounds. *Id.* at 300.

The relevant requitable grounds were found in *Matthews* v. *Rodgers,* 284 U.S. 521 (1932), where the Court had held that the "federal courts of equity" should exercise their discretion to withhold injunctions of state tax collections—except where the

state fails to provide a plain, adequate, and complete remedy—in order to avoid the interference with state fiscal operations resulting from such injunctions. 284 U.S. at 525-26. Because it concluded, in *Great Lakes,* that those equitable considerations applied with equal force to dictate the denial of declaratory relief, the Court found it "unnecessary to inquire whether the words of the [Tax Injunction Act] may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax." 319 U.S. at 299.

Characterizing the Tax Injunction Act as a legislative endorsement of the principles governing the exercise of jurisdiction by "federal courts of equity" as expressed in *Matthews, id.* at 298-99, the Court determined that the traditional equitable discretion of the district courts in equity cases survived enactment of the statute—§1341—specifically commanding the courts to withhold injunctive relief in cases involving state taxes. *Id.* at 301.

It is true that some lower federal courts have taken the additional step of interpreting the Tax Injunction Act as a bar to declaratory judgments. *See, e.g., Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071, 1074 (7th Cir. 1978), *cert. denied,* 439 U.S. 1121 (1979). But the Court has not gone so far. For example, in recognizing the "continuing validity" of *Great Lakes* in 1971, Justice Black, speaking on behalf of the Court, quoted the very language of that case quoted above in expressing the view that declaratory judgments were prohibited by the exercise of the traditional federal equity doctrine and not the Tax Injunction Act. *Samuels* v. *Mackell,* 401 U.S. 66, 71 (1971). More recently, the Court confirmed that principles of federal *equity,* not the Tax Injunction Act, barred federal declaratory judgments regarding state tax administration. *Rosewell* v. *LaSalle National Bank,* ___ U.S. ___, ___, ___, 101 S. Ct. 1221, 1229 n.15, 1235 n.33 (1981). None of these principles of equity, of course, applies to this action at law for damages.

B. Actions for Tax Refunds.

With the exception of its treatment of declaratory judgments, the Court has not addressed the relationship of any particular form of noninjunctive relief to the jurisdictional ban contained in §1341. Because one element of the damages claimed by Petitioners is measured by the amount of taxes overpaid, the district court below characterized this action as a suit for refund and concluded, on the basis of *Kelly* v. *Springett,* 527 F.2d 1090 (9th Cir. 1975) and *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972), that the action should therefore be barred in that such actions "would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief." *Fair Assessment in Real Estate Association* v. *McNary,* 478 F. Supp. 1231, 1233-34 (E.D. Mo. 1979), *aff'd,* 622 F.2d 415 (8th Cir. 1980), Pet. App. A-7.

The court in *Bland,* basing its decision largely on a construction of the statute as a broad restriction on any exercise of federal jurisdiction that might affect state tax administration, of which "an action for tax refund is an integral part," barred a tax refund claim that was ancillary to a prayer for injunctive relief. *Bland* v. *McHann,* 463 F.2d at 27, *cited in Kelly* v. *Springett,* 527 F.2d at 1094. *Accord, United Gas Pipe Line Co.* v. *Whitman,* 595 F.2d 323 (5th Cir. 1979); *Robinson Protective Alarm Co.* v. *City of Philadelphia,* 581 F.2d 371, 373 n.5 (3d Cir. 1978) (tax refund ancillary to prayer for injunctive relief); *O'Brien* v. *Dreyfus,* 493 F. Supp. 476 (E.D. Wis. 1980) (nominal tax refund action praying for declaratory relief).

Treatment of tax refund actions by the lower federal courts, however, has been divided. Some courts have found the inapplicability of §1341 to refund actions to be so self-evident that extensive discussion was not required. *Southland Mall, Inc.* v. *Garner,* 293 F. Supp. 1370 (W.D. Tenn. 1968). *Accord, Louisville & Nashville Railroad Co.* v. *Atkins,* 390 F. Supp. 576 (M.D. Tenn.), *aff'd,* 423 U.S. 802 (1975). *See also Matthews,* 284 U.S. at 525-26.

Arguably, the Court has considered and, without comment, rejected the applicability of the Tax Injunction Act to actions for tax refunds. In *Ott* v. *Mississippi Valley Barge Lines*, 336 U.S. 169 (1949), the Court examined the merits of a federal court action for the recovery of state taxes paid under protests premised upon the unconstitutionality of the taxes. The Court declined to erect §1341 as a bar to consideration of the merits. In view of the Court's "ever present duty . . . to satisfy itself that it is acting within the scope of jurisdiction conferred upon it by law," it may be assumed that the Court concluded that tax refund actions are not barred. *Central Steel & Wire Co.* v. *City of Detroit*, 101 F. Supp. 470, 471 (E.D. Mich. 1951) (citation omitted). *See also Rico Argentine Mining Co.* v. *Board of County Commissioners*, 215 F. Supp. 208 (D. Colo. 1963).

In any event, whether the Tax Injunction Act embraces refund actions remains an unsettled question. If anything, the Court has manifested tacit acceptance of the exercise of federal jurisdiction over such claims notwithstanding the possibility that the Act bars jurisdiction. However, even if the Court had conclusively determined to the contrary, that is, that tax refund actions are prohibited, resolution of that question would not dispose of Petitioners' action. This is not a tax refund case. The characterization of it as a tax refund case by the district court below is erroneous. In addition to the amount of taxes overpaid, Petitioners claimed both compensatory damages for expenses incurred in seeking relief and punitive damages. J.A. 10, 13-14. Moreover, Petitioners' action is not, as would be a refund action, directed against the public treasury; Petitioners seek to recover damages from Respondents as individuals.

C. Actions for Damages.

Actions for damages may overlap with refund actions, but they are not coterminous. In the context of the Tax Injunction Act bar, the significant distinction is that an action for a tax refund may be "an integral part of state tax administration," as

declared in *Bland* v. *McHann*, 463 F.2d at 27, and thus a part of the tax system into which the district courts arguably must avoid any intrusion. In no sense, however, is an action for damages, like that of Petitioners, an integral part of state tax administration. It is not difficult to comprehend that entertaining a refund action might unreasonably draw a federal court into the thick of a state tax administration plan and, arguably, may be banned. But an action for damages is necesarily outside that system.

Implicitly recognizing that actions for damages fall outside the tax administration system, several courts have instead premised their refusal to consider actions for damages on the potential result that the threat of liability would chill tax collection efforts. *A Bonding Co.* v. *Sunnuck*, 629 F.2d 1127, 1133 (5th Cir. 1980); *Advertiser Co.* v. *Wallace*, 446 F. Supp. 677, 680 (M.D. Ala. 1978). Another court equated the finding necessary for recovery of damages in a civil rights action with a declaratory judgment, which it assumed was barred by the Act. *Evangelical Catholic Communion, Inc.* v. *Thomas*, 373 F. Supp. 1342, 1344 (D. Vt. 1973).

The Seventh Circuit, after a thoughtful analysis of the legislative and judicial history of the Tax Injunction Act, rejected the proposition that an action for damages arising from the unconstitutional conduct of state tax officials would necessarily disrupt a state taxing process. *Fulton Market Cold Storage Co.* v. *Cullerton*, 582 F.2d 1071. *See also Ludwin* v. *City of Cambridge*, 529 F.2d 606 (1st Cir. 1979). Unlike injunctions and declaratory judgments, damage actions do not address the validity of ongoing policy or conduct, but only the consequences of conduct that has terminated:

> Fulton is seeking damages for the alleged wrongful and intentional conduct of certain officials who allegedly deprived Fulton of constitutional rights while acting under color of state law. Fulton seeks relief which is retrospective, i.e., *compensation for harm done*, unlike equitable relief which is anticipatory or prospective. *Fulton Market*, 582 F.2d at 1078 (emphasis supplied).

Nor does entertainment of a suit for damages premised on violations of clearly established constitutional rights require the federal court to determine matters more properly within the province of state courts. *Id.; see Ludwin* v. *City of Cambridge,* 592 F.2d at 610. Where a complaint alleges violations of established constitutional rights, or actual malice, the district court's determination of liability requires only that it examine the facts relating to each individual tax official, as to whether there was sufficient personal involvement and malice to sustain a claim against him under §1983.

> Additionally, the outcome of the present suit does not pivot upon the construction of some state statute or tax regulation which should more properly be construed by appropriate state courts. The issue is not whether a state statute is constitutionally valid but rather whether an official's conduct violated established constitutional standards. *Fulton Market,* 582 F.2d at 1078.

That narrow scrutiny in no way injects the federal court into any policymaking that is comparable to injunctions or declaratory judgments. The mere fact that those individuals whose conduct is examined happen to wear the cloaks of tax officials should not be sufficient to deprive the federal court of jurisdiction over the damage claims. To so hold would defeat the purposes of §1983.

D. Significance of §1983 Damages Actions.

The Court should not overlook the significance of §1983 in considering whether to prohibit damage actions. The Court has repeatedly confirmed the importance of the damage remedy under that law as a " 'vital component of any scheme for vindicating cherished constitutional guarantees.' " *Gomez* v. *Toledo,* 446 U.S. 635, 639, *quoting Owen* v. *City of Independence,* 445 U.S. 622, 651 (1980). At the same time, it is true that the general societal interest in integrity of the state

treasury is so vital that it may override the conflicting interests of individuals. Thus, the Act seeks to prohibit interruptions to the free flow of revenue into state coffers. Yet, even that interest must at times yield to a superior competing interest.

For example, despite the absolute statutory ban on the issuance of injunctions, federal courts may enjoin state tax collection, without regard to the existence of a state remedy, in cases where there is a substantial federal interest. In *Department of Employment* v. *United States,* 385 U.S. 355, 358 (1966), the Court made clear that the Tax Injunction Act does not bar the United States from seeking injunctions against state efforts to impose taxes on the federal government or its instrumentalities. Even where the United States is not itself a party to an action, but merely could be, a private party may sue to enjoin the collection of state taxes, notwithstanding the Act. *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976). *See also United States* v. *Dorgan,* 522 F.2d 969 (8th Cir. 1975), *on remand,* 413 F. Supp. 173 (D.N.D.), *aff'd,* 429 U.S. 953 (1976), where a private government contractor was able to so associate itself with the United States that it was able to elude the Tax Injunction Act bar.

Thus, not only is the Tax Injunction Act limited to suits for injuctive relief; it does not even bar such relief in all suits. Petitioners here do not suggest that a §1983 claim is of sufficient import to surmount the bar against injunctions. Injunctions are of no concern here. But, if the strong protection afforded the state can be penetrated to permit some injunctions, the Act should not shield past conduct of tax officials, particularly when weighed against the substantial federal interest in vindicating constitutional rights through §1983 actions.

E. Limitations of the Act to Equity.

A finding that an action for damages such as Petitioners' is barred by the Tax Injunction would be out of step with every

prior decision of the Court treating federal court deference to state tax administration or the construction of the Act. From *Great Lakes* to *Rosewell*, the Court has uniformly described the controlling considerations exclusively in terms of equity jurisdiction and anticipatory litigation.

Thus, in explaining the special treatment of such tax matters by the federal courts, the Court in *Lynch* v. *Household Finance Co.*, 405 U.S. 538 (1972), stated that the Court has "repeatedly barred *anticipatory federal adjudication* of the validity of state tax laws." *Id.* at 543 n.6 (emphasis supplied).

Again, in *Tully* v. *Griffin*, 429 U.S. 68 (1976), Justice Stewart confirmed that the

> congressional command of 28 U.S.C. §1341[is] that *no injunction* may issue against the collection of a state tax where state law provides a "plain, speedy and efficient remedy." As the Court frequently had occasion to note, the statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of the State to administer its own fiscal operations. 429 U.S. at 73 (emphasis added).

Most recently, the Court reiterated that in enacting the Tax Injunction Act,

> Congress . . . legislated to solve an existing problem by *cutting back* federal equity jurisdiction. *Rosewell* v. *LaSalle National Bank*, ____ U.S. at ____, 101 S. Ct. at 1235 (emphasis in original).

In contrast, the Court has never intimated that the Tax Injunction Act might apply to bar actions at law for damages.

Because of the Tax Injunction Act's exclusively equitable concern, Petitioners' action for damages simply does not fit within its bar. Petitioners seek no injunction or declaratory judgment. Petitioners seek only redress of injuries arising out of

Respondents' conduct. That conduct about which Petitioners have complained is past conduct that violated clearly established constitutional rights and that was done with malice.

Petitioners did not invite the district court to determine the correctness of the tax assessments at issue; because of Petitioners' previously established constitutional rights, correctness of the assessments is not in issue. Likewise, Petitioners did not solicit any determination that would prescribe a particular solution that Respondents must employ to remedy unequal assessments. All that the district court was asked to determine was whether the various Respondents had in fact engaged in the injurious conduct with the requisite knowledge and intent. A positive finding on that question would compel liability. That kind of contact between the federal courts and state tax officials does not fall within the restrictions of the Act. The Act does not deprive Petitioners of the right to an action for damages in federal court.

V. The Purposes Of The Tax Injunction Act Are Fulfilled Without Stretching The Act To Bar Actions For Damages.

Contrary to the conclusion of the courts that have barred actions for damages under §1341, a federal court's award of damages against state taxing officials premised upon malice or violations of clearly established rights will not, like an injunction, halt state tax administration. Those courts focused narrowly upon application of the Act to forestall such disruption. However, in reality, their concern about impact falls within the broader concern that an award of damages against *any* public official by *any* court may inhibit the proper functioning of government. The underlying fear is that the prospect of personal liability may cause public officials to adopt such excessive caution in their decisionmaking that they will cease to make and enforce laws, resulting in paralysis of government or, alternatively, that public officials will surrender the independence of their decisionmaking to the demands of the litigators. *E.g.*, the

instant case below, *Fair Assessment in Real Estate Association* v. *McNary*, 478 F. Supp. 1231, 1233-34 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980); *Advertiser Co.* v. *Wallace*, 446 F. Supp. 677, 680 (M.D. Ala. 1978).

The Court need not apply the Tax Injunction Act to actions for damages in order to protect state tax administration from unwarranted disruption caused by the intervention of federal courts. Adequate protection of state interests, including tax administration, already exists in the form of common law immunity. Immunity aims to avert the danger of inhibiting public officials from performing their responsibilities "with the decisiveness and judgment required by the public good" that would result from subjecting them to personal liability for injuries resulting from their official conduct. *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974).

One policy consideration pervades all analysis of immunity: The public interest requires that public officials freely make decisions and enforce laws. *Id.* at 241. In order to prevent interference with the effective operation of government, immunity interposes a barrier to personal liability for mistakes made in office:

> Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. *Id. at 241-42, quoted in Wood* v. *Strickland*, 420 U.S. 308, 321 (1975).

Error on the part of public officials is tolerated as a cost of conducting government; except in limited circumstances,

deliberate mistreatment of citizens is not. As a result, only limited classes of public officials have absolute immunity from personal liability under federal law. *See Lake Country Estates* v. *Tahoe Planning Agency,* 440 U.S. 391 (1979) (regional legislators); *Imbler* v. *Pachtman,* 424 U.S. 409 (1976) (public prosecutors); *Pierson* v. *Ray,* 386 U.S. 547 (1967) (judges); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951) (state legislators). Other classes of public officials—for example, prison officials, *Procunier* v. *Navarette,* 434 U.S. 555 (1978); governors and other state executive officers, *Scheuer* v. *Rhodes,* 416 U.S. 232; public school board members, *Wood* v. *Strickland,* 420 U.S. 308; police officers, *Pierson* v. *Ray,* 386 U.S. 547—have only qualified immunity. Public tax officials have a qualified immunity. *See Sunday Lake Iron Co.* v. *Wakefield Township,* 247 U.S. 350, 353 (1918).

For public officials entitled to qualified immunity, that is, those who are not judges, prosecutors, or legislators, official conduct is immune from liability under federal statutes only when undertaken in good faith "on the basis of an objectively reasonable belief that those acts were lawful." *Gomez* v. *Toledo,* 446 U.S. 635, 639 (1980).

Conversely, the only conduct undertaken in an official capacity for which a public official like a tax official faces exposure to personal liability is bad faith conduct—for example, conduct that is malicious, willful, invidious, intentional, and knowing or in violation of established constitutional rights. *See Wood* v. *Strickland,* 420 U.S. at 321-22. Necessarily then, the only conduct that can lead to personal liability for damages, without application of the Tax Injunction Act, is that bad faith conduct. The public good does not require the expansion of the Tax Injunction Act in order to protect such conduct. There is no public interest in protecting such conduct. To the contrary, as Justice White noted in his concurring opinion in *Imbler* v. *Pachtman,* the public interset lies in deterrence of such conduct:

> [O]rdinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which §1983 was enacted. 424 U.S. at 442.

That the public interset lies in deterrence of such conduct was recently acknowledged by the Court:

> "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize §1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's raisons d'etre." *Owen* v. *City of Independence,* 445 U.S. 622, 656 (1980), *quoting* Note, *Developments in the Law: Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1224 (1977).

Petitioners' case falls within the narrow bad faith exception to the broad immunity generally accorded public officials: their Complaint alleges not only that Respondents knowingly acted in derogation of Petitioners' clear constitutional entitlement under *Sioux City Bridge Co.* v. *Dakota County,* 260 U.S. 441 (1923), *Breckenridge Hotels Corp.* v. *Leachman,* 571 S.W.2d 251 (Mo. 1978) (*en banc*), and other authorities to assessment of their property at the same rate as the property of other taxpayers, but also, that Respondents maliciously intended to do so. Under any applicable test, that conduct is bad faith conduct and, therefore, excepted from immunity. It cannot be seriously contended that such conduct requires protection in order to further state tax administration. The Court cannot extend the Act's shield to preclude all damage actions merely in order to protect that sort of conduct, without grossly distorting the purposes of the Act.

The Tax Injunction Act is not needed to protect good faith conduct of state tax officials against personal liability; it is not desirable to protect their bad faith conduct; it should not be applied to bar Petitioners' action.

The Court need not inflate the Tax Injunction Act beyond its plain import in order to protect the legitmate activities of state taxing authorities. The Court should not do so. That is not the Court's proper role. Even if federal actions for damages did have undesirable effects on state tax administration, modification of the scope of the Act's bar is for Congress, not the Court, to decide. As the Court has repeatedly declared,

> It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. . . . The choices fall in the legislative domain. *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 476 n.28 (1978), *quoting Baltimore Contractors* v. *Bodinger,* 348 U.S. 176, 181-82 (1955).

Thus the Court can only construe the Tax Injunction Act as it exists, not as the Court or others might like it to be. That jurisdictional bar does not apply to actions for damages and does not preclude Petitioners' action.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Court reverse and vacate the order of the Court of Appeals for the Eighth Circuit and direct that court to remand the matter to the district court for trial on the merits.

Respectfully submitted,

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No. 80-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., J. DAVID CASSILLY, and LYNN F. CASSILLY,
Petitioners,

v.

GENE McNARY, WILLIAM A. SKAGGS, EDMUND J. PUNG, CHARLES T. SCHNEIDER, FRANK J. ANTONIO, DONALD G. WILLIAMS, TOM R. OTTO, and STEPHEN C. SNYDER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether the District Court erred in dismissing this action on grounds that the Tax Injunction Act, 28 U.S.C. Section 1341, bars a suit at law for damages under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983 arising from Respondents' alleged past discriminatory practices in assessing Petitioners' property and in taxing Petitioners.

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Evangelical Catholic Communion, Inc. v. Thomas, 373 F. Supp. 1342 (D. Vt. 1973) 25,26

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First National Bank of Greeley v. Board of Commissioners, 264 U.S. 450 (1924) 24

Ford Motor Credit Company v. Louisiana Tax Commission, 440 F. 2d 675 (5th Cir. 1971) 21

Fulton Market Cold Storage Co. v. Cullerton, 582 F.2d 1071 (7th Cir. 1978) *cert. denied*, 439 U.S. 1171 (1979) 21,25,27

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Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 22,24,29

Green v. Klinkofe, 422 F. Supp. 1021 (N.D. Ind. 1976) . 21

Hague v. CIO, 307 U.S. 496 (1939) 19

Hickmann v. Wujick, 488 F. 2d 875 (2nd Cir. 1973) 10,26

Horn v. O'Cheskey, 378 F.Supp. 1280 (D.N.M. 1974) .. 26

Huffman v. Pursue Ltd., 420 U.S. 592 (1975) 28

Kelly v. Springett, 527 F.2d 1090 (9th Cir. 1975) 23,24,25

Kistner v. Milliken, 432 F. Supp. 1001 (E.D. Mich 1977) 21

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 13

Louisville & Nashville Railroad Co. v. Atkins, 390 F. Supp. 576 (M.D. Tenn. 1975), *aff'd*, 423 U.S. 802 (1975) 21

Ludwin v. City of Cambridge, 592 F. 2d 606 (1st Cir. 1979) 21,25,26

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 10,13,31

Mandel v. Hutchinson, 494 F.2d 364 (9th Cir. 1974) 10

Matthews v. Rodgers, 284 U.S. 521 (1932) 13,20,24,31

Miller v. Bauer, 517 F.2d 27 (7th Cir. 1975) 10

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 19

Monroe v. Pape, 365 U.S. 167 (1961) 28

Natural Gas Pipe Line Company of American v. Sergeant, 337 F. Supp. 88 (D. Kans., 1972) 25

O'Brien v. Dreyfus, 493 F. Supp. 476 (E.D. Wis. 1980) . 25

Ott. v. Mississippi Valley Barge Line, Co., 336 U.S. 169 1949) 21

Owen v. City of Independence, 445 U.S. 622 (1980) 28

Pennsylvania R. Co. v. International Coal Min. Co., 230 U.S. 184 (1912) 23

Perez v. Ledesma, 401 U.S. 82 (1971) 13,14,31

Rico Argentine Mining Co. v. Board of County Commissioners, 215 F. Supp. 208 (D. Colo. 1963) 21

River Wear Com'rs v. Adamson, LR 2 AC 743 (1877) .. 11

Robinson Protective Alarm Co. v. City of Philadelphia, 581 F 2d 371 (3rd Cir. 1978) 25

Rosewell v. LaSalle National Bank, ____ U.S. ____, 101 S.Ct. 1221 (1981) 8,12,13,14,24,29

Southland Mall, Inc. v. Garner, 293 F. Supp. 1370 (W. D.Tenn. 1968) 21

Tully v. Griffin, Inc., 429 U.S. 68 (1976).....13,20,29

United Gas Pipe Line Co. v. Whitman, 595 F. 2d 323 (5th Cir. 1979) 20,25

United States v. Menasche, 348 U.S. 528 (1955) 11

United States v. State Tax Commission of the State of Mississippi, 505 F2d 633 (5th Cir., 1974) 25

Wells v. Malloy, 510 F.2d 74 (2nd Cir. 1975) 10

Wilwording v. Swenson, Warden, 404 U.S. 249 (1971).. 28

Constitutions and Statutes

United States Constitution, Amendment XIV Section 1 . 2

28 U.S.C. §1341 2,5,6,7,8,11,12,19,23,25,27,28,29,30

28 U.S.C. §1342 2,16

42 U.S.C. §1983 3,6,8,10,18,19,23,24,26,28,31

Other Authorities

Note, A Federal Forum for Broad Constitutional Deprivation by Property Tax Assessment, 65 Cal. L. Rev. 823 (1977) 18

Note, The Tax Injunction Act and Monetary Relief, 46 U. Chi. L. Rev. 736 (1979) 18

Comment, The Civil Rights Acts and Mr. Monroe, 49 Cal. L. Rev. 1945 (1961) 19

Sen Rep. No. 1035, 75th Cong., 1st Sess. (1937) 15,17

H.R. Rep. No. 1503, 75th Cong., 1st Sess. (1937) 15

H.R. Rep. No. 1194, 73d Cong., 2d Sess. (1934) 16

81 Cong. Rec. 1415 (Feb. 19, 1937).....14,16,17,18

78 Cong. Rec. 2021 (Feb. 6, 1934) 19

Webster's Third International Dictionary (15th ed.) (1969) 12

No. 80-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., J. DAVID CASSILLY, and LYNN F. CASSILLY,

Petitioners,

v.

GENE McNARY, WILLIAM A. SKAGGS, EDMUND J. PUNG, CHARLES T. SCHNEIDER, FRANK J. ANTONIO, DONALD G. WILLIAMS, TOM R. OTTO, and STEPHEN C. SNYDER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS McNARY, SKAGGS, ANTONIO, PUNG and SCHNEIDER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 622 F.2d 415, Pet. App. A-1 to A-2. The opinion of the United States District Court for the Eastern District of Missouri is reported at 478 F.Supp. 1231, Pet. App. A-3 to A-9.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, *en banc,* was entered on June 19, 1980, affirming the judgment of the United States District Court for the

Eastern District of Missouri, entered on November 7, 1979. The final mandate of the United States Court of Appeals for the Eighth Circuit was entered on July 15, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The Petition for Writ of Certiorari was filed on September 17, 1980 and granted on April 6, 1981.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1341: The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. §1342: The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the proper proceeding for redress.

§ 137.115(1) R.S.Mo. 1978 (App. A, *infra*, p. A - 1)

§ 137.385 R.S.Mo. 1978 (App. A, *infra*, p. A - 1)

§ 137.430 R.S.Mo. 1978 (App. A, *infra*, p. A - 1)

§ 139.031 R.S.Mo. 1978 (App. A, *infra*, p. A - 2)

§ 536.100 R.S.Mo. 1978 (App. A, *infra*, p. A - 3)

§ 536.140(6) R.S.Mo. 1978 (App. A, *infra*, p. A - 3)

STATEMENT OF THE CASE

Preliminary Statement

Petitioners' Statement of the Case is repleat with conclusions and allegations not contained within the record before this court and should be disregarded. It should also be noted that this case comes to the court on Respondents' Motion to Dismiss, and therefore, the Statement of the Case must be extracted from the unproven allegations of Petitioners' Complaint.

Petitioners brought an action for actual and punitive damages to remedy the alleged deprivation of Petitioners' rights under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983. Joint Appendix, A, 4, (hereinafter refer-

red to as "J.A.____"). The individual Petitioners, J. David Cassilly and Lynn F. Cassilly, are owners of real property with newly constructed improvements (hereinafter referred to as a "new home") located in St. Louis County, Missouri. Petitioner Fair Assessment In Real Estate, Inc. (hereinafter referred to as "FAIR") is a not-for-profit membership corporation formed by real estate taxpayers in St. Louis County to promote equitable enforcement of real property tax laws in the State of Missouri. J.A. 4,5. Respondents are various past and present officials of St. Louis County and the Missouri State Tax Commission entrusted with responsibility for enforcement of real property tax laws. J.A. 5. Respondent Gene McNary is the County Executive of St. Louis County (formerly "County Supervisor"), Respondents William A. Skaggs and Edmund J. Pung are present and past Directors of Revenue of St. Louis County; Respondents Charles T. Schneider and Frank J. Antonio are present and past Tax Assessors of St. Louis County; Respondents Donald G. Williams, Stephen C. Snyder, and Tom R. Otto are present and past members of the Missouri State Tax Commission. J.A. 5. Petitioners alleged that Respondents have enforced property tax laws to the damage of Petitioners and other owners of new homes. J.A. 3 & 4. According to Petitioners' allegations, Respondents have assessed new homes at a higher rate than old homes and have singled out such owners who have previously protested such disparity for property tax reassessment. J. A. 8,9,10,11,12.

Individual Petitioners, the Cassillys, sought money damages in the amount of a refund which Petitioners claim would be due if Petitioners were assessed at the alleged county-wide average rate of assessment and for punitive damages. J. A. 10,12,13. Petitioner FAIR sought money damages for expenses it allegedly incurred in the course of its efforts to obtain enforcement of state real property laws for the benefit of its members. J. A. 13.

Petitioners filed this action in the District Court for the Eastern District of Missouri, Eastern Division, on July 2, 1979.

On August 13, 1979, Respondents Gene McNary, William A. Skaggs, Edmund J. Pung, Charles T. Schneider and Frank J. Antonio, filed their joint Motion to Dismiss Petitioners' Complaint for failure to state a claim for which relief may be granted and for lack of jurisdiction over the subject matter. On August 10, 1979, Respondents Donald G. Williams, Thomas R. Otto, and Stephen C. Snyder, filed an Answer generally denying the allegations in Petitioners' Complaint.

After considering the pleadings, suggestions and memoranda filed by the various parties, and without the introduction of evidence or oral argument, the district court entered its order on November 7, 1979 dismissing this action in its "entirety," on the basis of the Tax Injunction Act, 28 U.S.C. §1341 and doctrines of federal abstention and comity considerations. Petition for Certiorari, Appendix A-3 to A-9 (hereinafter referred to as "Pet.App.____").

All Petitioners, the Cassillys and FAIR were therefore dismissed. Pet.App. A-8 to A-9. All Petitioners appealed to the Eighth Circuit Court of Appeals.

Thereafter, on June 19, 1980, upon consideration of the briefs and oral arguments of the parties, the Eighth Circuit, en banc, entered its order affirming the district court judgment but issued no opinion. Pet.App. A-1 to A-2.

Although, individual Petitioners and Petitioner Fair made application for a writ of certiorari, both Petitioners and Respondents have briefed only the issues regarding individual Petitioners, the Cassillys.

SUMMARY OF ARGUMENT

I

Individual Petitioners, the Cassillys, alleged that various local and state tax officials (Respondents) acting under color of state law and in their individual capacities, have violated Petitioners' right to Equal Protection and Due Process of law under the Fourteenth Amendment to the United States Constitution in the assessment of the Cassillys' home. Petitioner FAIR alleged that it incurred certain expenses in the course of its efforts to obtain enforcement of state real property tax laws on behalf of its members. FAIR's members were alleged to be real estate taxpayers. Individual Petitioners sought money damages in the amount of a refund which individual Petitioners claim would be due if Petitioners were assessed at the alleged average rate of assessment and for punitive damages. FAIR sought money damages in the amount of expenses incurred in the course of its efforts to obtain enforcement of state real property tax laws.

Because Petitioners' action is a claim for a refund due to an alleged overassessment, the district court was correct in dismissing Petitioners' action on the grounds that the Tax Injunction Act, 28 USC §1341, as well as the doctrine of abstention and comity provisions embodied therein, bars this action. Specific statutory bars to Federal court jurisdiction will prevail over a claim brought pursuant to 42 USC §1983, such as Petitioners'.

II

The purpose of statutory interpretation is to ascertain the intent of the legislature. No one aspect of the several criteria used in that interpretation is determinative of intent, but rather each of several elements must be weighed and summed together to arrive at the proper interpretation of the language used to express that intent. The starting point in that determination is the language itself. The language used in §1341 admits of a bar to

federal court jurisdiction for any action which "suspends or restrains" state tax process, as well as to actions which "enjoin" those same matters. Thus, the language of the statute is sufficiently broad to bar Petitioners' action for damages.

III

As an aide to statutory construction, the legislative history and legal/historical context are persuasive in reaching the conclusion that the purpose of the enactment of §1341 was to defer to the states in matters of state taxation. This purpose is consistent with principles of federalism and comity which were given expression in several cases which preceded the enactment of §1341.

Similarly important as an aid to statutory construction is the contemporaneous case law at the time of enactment of §1341. An examination of that case law reveals that prior to the enactment of §1341 there was a complete absence of federal cases of a non-equity nature dealing with state taxation matters. The absence of non-equity cases explains the preoccupation with equitable actions expressed in the legislative history. Further, despite this preoccupation, there are even stronger threads running throughout the legislative history of deference to the states in taxation matters and of concern for the fiscal integrity of those states. These stronger threads amply support the conclusion that Congress in enacting §1341 intended to bar all federal actions dealing with state taxation issues, regardless of the nature of the action.

Petitioners' characterization of their action as one of law, as opposed to equity, does not vaporize the congressional intent, embodied in §1341, to defer to the state in this area of primary state concern. An action at law is barred for the same reasons as one in equity.

IV

The Court in *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221 (1981), pointedly refused to confine the purpose and intent of §1341 to bar only equitable actions. The Act has its "roots in equity" but its purpose and intent are to preserve the fiscal integrity of the states through a bar to federal jurisdiction in state taxation matters.

Judicial interpretation of the Tax Injunction Act by the lower courts is instructive. The circuits have consistently held that the Tax Injunction Act bars declaratory judgment actions. Likewise, the circuits which have considered the issue have been consistent in their treatment of "refund actions" where the jurisdictional bar of the Tax Injunction Act has been raised.

There exists no logical basis on which to treat actions at law differently from "refund actions", as actions at law would be as disruptive to the assessment, levy and collection of taxes as those nominally termed "equitable actions." The lawyer's pen, like an artist's brush, can paint an action as "equitable" or "legal" to fit the canvas of a taxpayer's complaint. Federal court entertainment of state tax actions at law will necessarily entangle the courts in the administration of the taxation system and allow Petitioners to do indirectly what Petitioners are conclusively barred from attempting through an equitable action.

The mere fact that Petitioners have brought their action under 42 USC §1983 does not magically remove the bar to jurisdiction of the Tax Injunction Act. This court has concluded that mere invocation of 42 USC §1983 does not extinguish specific legislative bars to federal court jurisdiction. By the very nature of a §1983 complaint, there exists no requirement of an exhaustion of administrative or state remedies. Thus, without the statutory bar of the Tax Injunction Act, a damage action could be brought by disgruntled taxpayers prior to any attempt by the taxpayer to contest the validity of the tax in the appellate procedure provided under state law. As a practical matter, the

orderly process of the collection of taxes will be disrupted if the taxpayer is permitted to avoid the remedies provided by state law.

Barring an action for damages in federal court under the Tax Injunction Act does not lead to the result that Petitioners will be prevented from vindicating federal constitutional rights, as Petitioners urge. The Tax Injunction Act bars federal court jurisdiction only where "a plain, speedy and efficient remedy may be had in the courts of such state." Thus, Petitioners are not prevented by the Tax Injunction Act from pursuing their action in state court with ultimate review to this court.

V

Allowing an action for damages will defeat the broad purpose of the Tax Injunction Act - to prevent the interference of federal courts in state taxation matters. A damage action, no less than an action in equity, will call into question the complex methods and procedures utilized in the collection, levy and assessment of taxes by taxing officials. Petitioners' recitation of the law of qualified immunity enjoyed by public officials in the administration of the state tax system is irrelevant. Damage actions against individual officials who are carrying out the policies of the taxing instrumentality are actions against the instrumentality itself. What damages are awarded will no doubt come from the coffers of the taxing instrumentality, particularly as the nature of those damages is a "refund" for overcollection of taxes.

If the Tax Injunction Act is held not to bar actions such as Petitioners', the potential exists for §1983 actions to be initiated in federal court prior to any contest of taxes in the forums provided under state law. Thus, state taxing officials would be required to defend their procedures and methods in the first instance in the federal courts, and those courts would be necessarily interfering with the legitimate interests of the states in implementing their own taxation systems. Such a result would clearly thwart the expressed intent of Congress in enacting the Tax Injunction Act.

ARGUMENT

I. The District Court Properly Recognized That Petitoners' Action Brought Pursuant To 42 U.S.C. §1983 Does Not Avoid The Prohibition Of The Tax Injunction Act.

Petitioners' dissertation on the elements required to state a claim under 42 U.S.C. §1983 under point 1 avoids the very question before the court which is whether the Tax Injunction Act bars such an action in the first instance. If the court holds that the damage action is so barred, whether or not the elements averred by Petitioners state a claim under §1983 is irrelevant.

The court has held that merely stating a claim under 42 U.S.C. §1983 does not extinguish specific legislative bars to federal court jurisdiction. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 542 n. 6 (1972). The circuits which have considered whether the Tax Injunction Act bars claims under §1983 for injunctive and similar relief have consistently held that such an action is so barred. *Hickmann* v. *Wujick*, 488 F.2d 875 (2nd Cir. 1973); *Miller* v. *Bauer*, 517 F2d 27 (7th Cir. 1975), *Wells* v. *Malloy*, 510 F2d 74 (2nd Cir. 1975); *Coon* v. *Teasdale*, 567 F.2d 820 (8th Cir. 1977); *Mandel* v. *Hutchinson*, 494 F2d 364 (9th Cir. 1974); *American Commuters Association* v. *Levitt*, 405 F.2d 1148 (2nd Cir. 1969).

Hence, the mere statement of a cause of action otherwise cognizable under §1983, will not lie because of the specific statutory bar of the Tax Injunction Act.

It is thus helpful to first explore the nature of the "damages" requested by Petitioners before examining the language, legislative history, and underlying purpose of the Tax Injunction Act. Individual Petitioners, the Cassillys, sought money damages in the amount of a refund which individual Petitioners claim would be due if their property were assessed at the alleged average rate of assessment and for punitive damages. Petitioner FAIR sought money damages in the amount of expenses incur-

red in the course of its efforts to obtain enforcement of state real property taxes. Petitioners' action is a claim for refund due to an alleged overassessment. Upon careful analysis of the Tax Injunction Act, Petitioners' action is patently within the purpose of the jurisdictional bar of the Act.

II. The Language Of The Tax Injunction Act Is Sufficiently Broad To Bar Actions For Damages.

The primary consideration in the interpretation of a statute is to determine the intent of the legislature. This maxim was given full expression by Lord Blackburn in 1877:

> "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of the word varies according to the circumstances with respect to which they were used." *River Wear Com'rs* v. *Adamson,* LR 2AC 743 (1877)

The words used in the statute alone are not determinative of intent, but may logically be used as a starting point. Section 1341 provides as follows:

> "The district court shall not enjoin, *suspend or restrain* the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. Section 1341 (emphasis supplied).

Patently, the words of the statute contemplated the barring of actions other than injunctions as the words "suspend or restrain" must be given some meaning. *United States* v. *Menasche* 348 U.S. 528 (1955). If the intent of the legislature

was, as Petitioners urge, purely to bar injunctive relief, the remaining words would be superfluous. Meaning must be accorded the words "suspend or restrain".

The word "enjoin" is a word of art in the legal lexicon and has specific meaning. However, the words "suspend" and "restrain" enjoy only their common meanings. According to the 1969 edition of Webster's Third International Dictionary the word "suspend" means "to debar, or cause to withdraw temporarily from any privilege, office of function, to cause to stop for a time; to set aside or make temporarily inoperative." The word "restrain" means "to hold back from some action, procedure or course, to limit or restrict to or in respect to a particular action of course; to moderate or limit the force, effect, development, or full exercise of; to keep from being manifested or performed." Webster's Third International Dictionary (15th ed.) 2303, 1936 (1969).

Thus, the implication of the words "suspend or restrain" is much broader than to merely "enjoin". "Restrain" includes not only actions that are anticipatory in their effect but also actions which "restrict, moderate or limit", which implies a bar to all actions that have those ill-effects on the administration of state tax matters.

In light of this analysis, Petitioners' contention that specific statutory language barring damage actions would be expected is ill-founded. Petitioners' citation to *Rosewell* v. *LaSalle National Bank*, ___ U.S. ___, 101 S. Ct. 1221, 1234 (1981) for that proposition is clearly inapposite. In fact, the Court in *Rosewell* v. *LaSalle National Bank, supra,* at 1234, specifically found that "the statute's broad prophylactic language is incompatible" with the carving out of exceptions urged therein. Hence, a bar to damage actions is consistent with the language used in §1341.

Abiding by Blackburn's formulation, the circumstances which led to the enactment of the statute should be examined to aid in the determination of legislative intent. As important as

the legislative history is the legal posture of cases touching on matter of state taxation considered by federal courts prior to and contemporaneous with the enactment of the Tax Injunction Act, which cases Congress is presumed to have been aware of.

III. The Legislative History Of The Tax Injunction Act And The Historic Case Law Development Establishes That Petitioners' Action For Damages Is Barred By That Act.

The court most recently in *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221 (1981) extensively examined the legislative history of the Tax Injunction Act in its analysis of the meaning of the words "plain, speedy and efficient remedy" used in the statute. Petitioners have also cited at great length certain statements made in the Senate and House prior to the enactment of what ultimately became §1341. This legislative history must be placed within a larger historical perspective of the traditional deference to the states in the administration of their own fiscal operations. *Tully* v. *Griffin, Inc.*, 429 U.S. 68 (1976); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Lehnhausen* v. *Lake Shore Auto Parts, Co.*, 410 U.S. 356 (1973); *Bull* v. *United States*, 295 U.S. 247 (1935); *Matthews* v. *Rodgers*, 284 U.S. 521 (1932); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972).

As stated by the Court in *Lynch* v. *Household Finance Corp., supra*, "Congress has treated judicial interference with the enactment of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly. . ." 538 n. 6.

A similar concern with protecting state tax administration matters from federal interference is echoed in the legislative history of the Act. The history indicates that the Act was in response to several serious problems arising from federal court jurisdiction over state tax disputes. Congress was concerned with the discriminatory treatment of state residents attempting

to dispute state and local taxes.[1] Congress was especially disturbed by the fact that:

> "The existing practice of the Federal courts to entertain tax-injunction suits makes it possible for foreign corporations to withhold from a State and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt State and county finances, and thus make it possible for such corporations to determine for themselves the amount of taxes they will pay." 81 Cong. Rec. 1415, 1416 (Feb. 19, 1937).

Finally, the Act also was indicative of Congressional hostility to the increased exposure of state officials to suits for injunctive relief resulting from the court's opinion in *Ex parte Young*, 209 U.S. 123 (1908). See *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221, 1233, at n.28 (1981); *Perez* v. *Ledesma*, 401 U.S. 82, 115 (1971) (Brennan, J., concurring in part and dissenting in part).

It would be a mistake, however, to dwell on any single problem referred to in the legislative history, as Petitioners in their Brief for this Court have done, and construe the resolution of that problem as the sole motivation of Congress in passing the Tax Injunction Act. The problems are diverse and there is no indication in the legislative history that Congress intended to narrow the scope of the Act to apply solely or primarily to any one of them. Nor does the language of the Act lend itself to such a restrictive interpretation. The Act goes beyond being a mere response to *Ex parte Young, supra,* as it limits the jurisdiciton of federal courts to hear suits against counties and municipalities, as well as against states, which entities had never been subject to the protections of the Eleventh Amendment to the U.S. Constitution. If Congress had been solely concerned

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[1] Sen. Rep. 1035, 75th Cong. 1st Sess. (1937).

with the discriminatory treatment of state residents it could have merely limited the ability of federal courts to hear state tax cases where jurisdiction was based solely upon the ground of diversity of citizenship. Similarly, if Congress had been moved to pass the Act solely in order to deny foreign corporations the opportunity to litigate state tax issues concurrently in state and federal courts, the Act as passed was overbroad. Finally, the language of the Act expresses broader concerns than just the tying up of state revenues during periods of litigation in federal courts. As none of the problems discussed in the legislative history alone account for the language and scope of the Act, it would appear that Congress intended a broader purpose for the Act. As each of the problems discussed were of concern to Congress, it would appear that Congress intended to deal with their common source — federal court jurisdiction over state tax disputes. It would also appear that it sought to resolve these problems by radically restricting such jurisdiction, thus effectuating a policy of non-interference in state fiscal operations.

A. Congressional Intent To Limit Jurisdiction

Despite the contentions of Petitioners that Congress only sought to prevent the granting of injunctions by federal courts in state tax disputes, the history strongly suggests that all jurisdiction of federal district courts over state tax disputes was intended to be removed, except where no "plain, speedy and efficient remedy" was available in state courts.

The Senate report on S1551, which eventually became 28 USC §1341, begins by stating:

> "S1551 amends section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes." Sen.Rep.No. 1035, 75th Cong., 1st Sess. (1937).

Similarly, the House Report begins:

> "The Committee on the Judiciary, to whom was referred the bill (S1551) to amend section 24 of the Judicial Code,

as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes, after consideration, report the same favorably to the House with the recommendation that the bill do pass." H.R. Rep. no. 1503, 75th Cong., 1st Sess. 1 (1937).

These reports indicate that both committees envisioned the Tax Injunction Act as removing from federal jurisdiction all actions which would tend to interfere with the collection of state taxes. The effect which Congress believed the language of the Act would have is stated in the legislative history of the Johnson Act, 48 Stat. 775 (1934) (28 USC 1342), from which Act the language of the Tax Injunction Act was taken. The House Report in opposition to the Johnson Act noted:

"The Johnson bill (S752) seeks to withdraw completely from the district courts of the United States all jurisdiction in suits relating to orders of State administrative boards or commission affecting rates chargeable by public utilities." H.R. Rep. No. 1194, 73rd Cong., 2d Sess. 1 (1934).

An even stronger indication that Congress was hostile to federal court jurisdiction over state tax disputes, and that Congress believed the proper forum for such disputes was in the state courts is contained in the following remarks of Senator Bone, the sponsor of the Act, which remarks quote from the Senate report on the Johnson Act, Sen. Rep. 125, 73rd Cong., 1st Sess. (1934):

"The following quotations from the same report are also thought to be applicable to this bill in the same manner that they were applicable to the Johnson bill:

* * *

When a State question arises under a State statute, why not let the courts of that State settle that controversy, whether the controversy is between citizens of one State or citizens

> of two different States? Why not be logical and let the State courts try controversies arising under State laws within their borders instead of permitting a few privileged persons who do business in a State to take their controversies into Federal courts and thus burden Federal judges with the settlement of State questions and the control of lawsuits arising entirely and solely out of controversies under State laws?" 81 Cong. Rec. 1415, 1416-1417 (Feb. 19, 1937).

It is apparent that Congress believed that state tax disputes could and should be properly settled in state courts. This concern would not be remedied if Congress intended the Act to apply only to injunctive actions, as Petitioners insist.

Congress did not intend to limit the exercise of federal rights even though federal jurisdiction over state tax disputes was eliminated. The Senate Report states:

> "It should be emphasized that the bill does not take away any equitable right of the taxpayer or deprive him of his day in court. Specific provision is made that the suit will not be withdrawn from the jurisdiction of the Federal district court except where there is a plain, speedy and efficient remedy at law or in equity in the courts of the State. A full hearing and judicial determination of the controversy is assured. An appeal to the Supreme Court of the United States is available as in other cases." Sen.Rep. 1035, 75th Cong., 1st Sess. 2 (1937).

Senator Bone also noted:

> "While there are many other parts of the committee's report on the Johnson Act which are well worth rereading in connection with the consideration of the proposed legislation, there is presented here only one additional quotation, which deals with the constitutional power of the Congress to enact legislation of this type: 'The object of

> the legislation, as it has been distinctly stated, is to take away jurisdiction from the district courts of the United States. It is not intended to take away and does not take away any jurisdiction of the Supreme Court of the United States." 81 Cong. Rec. 1415, 1417 (Feb. 19, 1937).

It is clear that Congress intended state tax disputes to be resolved solely in the state court systems (unless proper remedies were not available in those systems). To accomplish this purpose, it was within the contemplation of Congress to remove jurisdiction of the federal courts over all state tax disputes.

Petitioners, however, make much of the fact that the legislative history of the Tax Injunction Act speaks primarily, if not exclusively, of preventing injunctive actions, and they thus conclude that only suits for injunctions were barred by the Act. If the legislative history speaks exclusively in terms of injuctive actions with reference to federal court interference in state taxation matters, it is not without reason. Prior to the passing of the Act in 1937, there was a total absence of damage suits or declaratory judgment actions to contest the validity of state or local taxes in federal court.[2] Damage suits under §1983 were non-existent at the time of passage and it seems likely that Congress never considered the possibility of either declaratory judgment or damage actions in this context.[3] It was not until 1938,

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[2] See Note, *The Tax Injunction Act and Monetary Relief*, 46 U. of Chi. L. Rev. 736, 745 n. 44 (1979).

[3] See Note, *A Federal Forum for Broad Constitutional Deprivation by Property Tax Assessment*, 65 Cal. L. Rev. 823, 833-834 (1977).

one year after passage of §1341, that federal courts began the expansion of substantive and remedial rights under §1983.[4] Damage actions under §1983 against municipalities have not been expanded until most recent times.[5]

Given this legal/historical context, it is likely that Congress believed that it was barring all suits which might be brought against taxing bodies or officials. This conclusion is further supported by a comment in the legislative history of the Johnson Act, concerning a similar effect of that legislation. Senator Austin, during the debates over the Johnson Act, stated:

> "The sole method of enforcing the Bill of Rights authorized by law and adopted by the Federal courts in most cases is by way of injunction; and yet that is the instrument that we are trying to take away from these courts, not in general, not with respect to all men, but with respect to a certain class of men, discriminating against them to their very great damage." 78 Cong.Rec. 2021 (Feb. 6, 1934).

The congressional intent to effectuate a policy of non-interference by federal courts in state fiscal affairs should not be frustrated by a narrow reading of the legislative history of the Act. The potentiality of actions against state taxing bodies or officials other than actions for injunctive relief effectively developed after passage of the Act; congressional preoccupation with the only form of action it believed possible should not be used to thwart its intent to remove completely all jurisdiction over state tax disputes and issues from federal district courts.

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[4] The Court in *Hague* v. *CIO*, 307 U.S. 496 (1939), first defined what was meant by "rights, privileges or immunities secured by the constitution and laws" as found in the Civil Rights Act of 1871 (42 USC §1983). Afterwards, lower federal courts began to entertain claims of infringement for a wide variety of property and personal rights. See Comment, *The Civil Rights Acts and Mr. Monroe*, 49 Cal. L. Rev. 145, 147, 169 (1961).

[5] *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1977).

Thus, the intent of Congress was focused on the numerous problems arising from federal court jurisdiction over state tax disputes. Congress attempted to resolve these problems by eliminating that jurisdiction and by restricting the resolution of state tax disputes to state courts. Clearly, Congress intended to establish a policy of non-interference by federal district courts in state tax issues and fiscal affairs with the purpose of preserving to the states this area of prime importance. *United Gas Pipeline Co.* v. *Whitman*, 595 F.2d 323 (5th Cir. 1979); *Matthews* v. *Rodgers, supra*, 525. *Tully* v. *Griffin, Inc., supra*, 73.

IV The Weight Of Judicial Authority Has Interpreted The Tax Injunction Act As A Bar To Petitioners' Action For Damages.

Examination of circuit and district court decisions with regard to the applicability of the Tax Injunction Act is instructive.

The overwhelming weight of judicial authority which has interpreted the Tax Injunction Act has found that the Act bars declaratory judgment, damage actions, and hybrid damage actions (refund suits). The few courts which have deviated from this posture have construed the Act very narrowly and

disregarded the purpose and intent of the Act.[6] The misinterpretation of the Tax Injunction Act is most apparent in *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978) *cert. denied* 439 U.S. 1171 (1979), and will be explored, *infra.*

It is convenient to analyze the lower court decisions in terms of the action brought.

A. *Declaratory Judgment*

Federal courts have consistently held that the Tax Injunction Act bars declaratory relief. *Coon* v. *Teasdale,* 567 F.2d 820 (8th Cir. 1977); *Ludwin* v. *City of Cambridge,* 592 F.2d 606 (1st Cir. 1979); *Aluminum Company of America* v.*Department of the Treasury of the State of Michigan,* 522 F.2d 1120 (6th Cir. 1975); *Ford Motor Credit Company* v. *Louisiana Tax Commission,* 440 F.2d 675 (5th Cir. 1971); *Green* v. *Klinkofe,* 422 F.Supp. 1021 (N.D. Ind. 1976); *Fulton Market Cold Storage Co.* v. *Cullerton, supra.*

The basis for extending the bar to declaratory actions is best expressed by the court in *Ludwin* v. *City of Cambridge,* 529 F.2d 606, 608-609 (1st Cir. 1979):

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[6]Only three cases can arguably support Petitioners' position that the Tax Injunction Act does not bar damage actions: *Southland Mall, Inc.* v. *Garner,* 293 F.Supp. 1370 (W.D. Tenn. 1968); *Louisville & Nashville Railroad Co.* v. *Atkins,* 390 F.Supp. 576 (M.D. Tenn.); *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978) *cert. denied* 439 U.S. 1171 (1979). In the other cases cited by Petitioners, either the Tax Injunction Act was not raised as a bar to the "damage" action *(Ott* v. *Mississippi Valley Barge Lines,* 336 U.S. 169 (1948); *Rico Argentine Mining Co.* v. *Board of County Commissioners,* 215 F.Supp. 208 (D. Col. 1963)) or a later case rejected the decision (*Central Steel & Wire Co.* v. *City of Detroit,* 99 F.Supp. 639 (E.D. Mich. 1951) rejected by same court in *Kistner* v. *Milliken,* 432 F.Supp. 1001 (E.D. Mich. 1977)).

> ". . . plaintiff's declaratory action as well as his damage claim is predicated upon the invalidity of the assessment itself and is, in essence, an attack upon the tax assessment. Thus, the federal policy of non-interference with a state's collection of its revenue except where an asserted federal right might otherwise be lost governs the disposition of this declaratory action. (citations omitted) This policy is applicable even where, as here, the complaint is based on 42 USC §1983. (citations omitted) Federal courts must, therefore, abstain unless adequate state procedures do not exist for raising plaintiff's federal claims."

Petitioners' contention that the court in *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293 (1943), previously considered this issue and refused to extend the bar to declaratory actions, is clearly a misreading of *Great Lakes.* In that case the court found it "unnecessary to inquire whether the words of the statute may be so construed. . ." and instead relied on traditional principles of federal equity jurisdiction. The thrust of the court's opinion was to make clear that Acts such as the Tax Injunction Act, the Federal Declaratory Judgment Act (Act of June 14, 1934 48 Stat. 955) and the Act of August 30, 1935, 49 Stat. 1027, all mentioned in the decision, did not in any way restrict the court's equity powers, or the freedom to withhold equitable relief in cases outside of the specific statutory bars. *Great Lakes* is better interpreted as a reassertion of the federal court's equity jurisdiction which had been considerably restricted by Congress, than, as contended by Petitioners, as a refusal to construe the language of the Tax Injunction Act to bar declaratory relief. See *Great Lakes,* at 301.

B. Actions for Tax Refunds

Actions in which taxpayers have prayed for a "refund" of taxes allegedly overpaid as a result of the invalidity of the tax assessed, are damage actions. It is hornbook law that the word "damages" is equated with the injury resulting from the direct

and proximate actions of the wrongdoer. *Pennsylvania R. Co.* v. *International Coal Min. Co.*, 230 U.S. 184 (1912) J. Pitney dissenting at 213.

As noted by Petitioners in Point IV of their Brief, the district court in *Fair Assessment in Real Estate Association Inc.*, v. *McNary*, 478 F.Supp. 1231 (E.D.Mo. 1979), *aff'd.* 622 F.2d 415 (8th Cir. 1980) Pet.App., A-7, characterized individual Petitioners' action as that of a suit for refund. Based on the damages pled by individual Petitioners, this is, in fact, their only alleged injury excluding their claim for punitive damages. There are no other elements of damage, as Petitioners imply in their brief, under their cause of action premised in §1983. As was extensively discussed by Justice Pitney, dissenting in *Pennsylvania R. Co.* v. *International Coal Min. Co., supra,* at 213, in reference to discriminatory shipping rates imposed upon the plaintiff therein:

> "The word 'damages', according to its customary usage, is at least as properly applicable to the immediate and direct result of imposing higher charges upon one shipper than are customarily charged under similar circumstances and for a like service to other shippers, as it is to the ultimate consequences of such discrimination."

Thus, judicial determination of "refund actions" is dispositive of Petitioners' "damage action".

The district court, in reaching the determination that Petitioners' action was barred by §1341, relied on the well reasoned opinions in *Kelly* v. *Springet*, 527 F.2d 1090 (9th Cir. 1975) and *Bland* v. *McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 977 (1973), both "refund actions". The court in *Bland* v. *McHann, supra,* cited all of the considerations heretofore discussed which are encompassed in the purpose and intent of the Tax Injunction Act.

> "We are convinced that both long-standing judicial policy and congressional restriction of federal jurisdiction in

> cases involving state tax administration make it the duty of federal courts to withhold relief when a state legislature has provided an adequate scheme whereby a taxpayer may maintain a suit to challenge a state tax. The taxpayer may assert his federal rights in the state courts and secure a review by the Supreme Court." 463 F.2d at 24.

The further rationale of the court, 453 F.2d at 26-28 is compelling. Citing *Great Lakes Dredge & Dock Co.* v. *Huffman, supra,* as well as *First National Bank of Greeley* v. *Board of Commissioners,* 264 U.S. 450, (1924), the court of appeals concluded that the policy expressed by the Tax Injunction Act, required the holding that:

> "in matters involving state tax law state remedies must be pursued where they are plain, adequate and complete."

The court in *Bland* v. *McHann supra* noted that some district courts found §1341 applicable only to requests for anticipatory relief basing their decisions "solely on the language of the stateute. . .but there is more" at 25. The court explained that the "more" included the deference to state fiscal operations expressed in *Matthews* v. *Rodgers,* 284 U.S. 521 (1932), and *First National Bank of Greeley* v. *Board of Commissioners, supra,* in which the court ruled that Plaintiffs could not seek relief in the form of a request for a state refund in the federal courts, where a remedy was available under the statutes. That the Act had as its primary purpose the limitation of federal jurisdiction over such an important local concern as taxation, was recently affirmed by this court in *Rosewell* v. *LaSalle National Bank,* ____ U.S. ____, 101 S.Ct. 122[1], 1231 (1981).

Lastly, the court in *Bland* v. *McHann, supra* at 27 noted that an action for a refund "is an integral part of state tax administration."

In *Kelly* v. *Springett, supra,* also cited by the district court, a taxpayer brought an action under 42 USC §1983 against a state

narcotics agent, and members of the state Franchise Tax Board, asserting that his civil rights were violated by confiscation of money in his possession and in his bank account. Part of the relief requested was a demand for judgment of an amount of money seized under the jeopardy assessment of the California Franchise Tax Board, which the Court referred to as "nothing less than a claim for a tax refund." 527 F.2d at 1093.

Other courts in accord with the decisions in *Bland* v. *McHann, supra,* and *Kelly* v. *Springett, supra,* are as follows: *United States* v. *State Tax Commission of the State of Mississippi,* 505 F.2d 633 (5th Cir. 1974); *United Gas Pipe Line Co.* v. *Whitman,* 595 F.2d 323 (5th Cir. 1979); *Evangelical Catholic Communion, Inc.* v. *Thomas,* 373 F.Supp. 1342 (D.Vt. 1973) *aff'd* 493 F.2d 1391 (2nd Cir. 1974); *Natural Gas Pipe Line Company of America* v. *Sergeant,* 337 F.Supp. 88 (D. Kans. 1972); *Robinson Protective Alarm Co.* v. *City of Philadelphia,* 581 F.2d 371 (3rd Cir. 1978); *O'Brien* v. *Dreyfus,* 493 F.Supp. 476 (E.D. Wis. 1980).

Individual Petitioners' contention that their action cannot be designated as a refund action is without merit as Petitioners only demonstrable alleged injury is the amount of money paid in taxes as a result of the alleged overassessment of their property.

C. Other Actions for Damages

Despite Petitioners' contentions to the contrary that their action is in some way not of the same genre as "refund actions", the courts which have considered the issue have held that §1341 bars such damage actions, with the exception of the court in *Fulton Market Cold Storage Co.* v. *Cullerton, supra.* The reasoning of the courts in *Advertiser Company* v. *Wallace,* 446 F.Supp. 677 (M.D. Ala. 1978); *Ludwin* v. *City of Cambridge, supra,* and *Fair Assessment in Real Estate Association Inc.* v. *McNary, supra,* is consistent with the reasoning used throughout all of the cases in which the courts have held that §1341 is a bar to federal consideration in matters of state tax ad-

ministration. This consistency is expected because the principles, purpose and intent of §1341 are the same regardless of the label placed on the action brought.[7]

Without further belaboring the point, the court's incisive reasoning in *Advertiser Company* v. *Wallace, supra,* is directly on point as complainant in that action, as Petitioners do here, brought an action for both actual and punitive damages premised on 42 USC §1983. The Court stated at 679, 680:

> "Arguably, the case law leaves open the precise issue presented here - i.e., whether a Section 1983 action seeking only compensatory and punitive damages is barred by Section 1341. Yet, the same policies which precluded awarding anticipatory relief or a refund should also preclude an award of the damages sought in this case. Although perhaps less coercive than anticipatory relief and less intrusive than a refund, the damage award plaintiff seeks, especially its request for punitive damages, still is designed to deter collection of the taxes now being assessed by defendants. . . ." *Id.* at 679, 680.

Further, such inquiry unnecessarily entangles the federal court in the very heart of the taxation process - that of the determination of assessments. As the court stated in *Ludwin* v. *City of Cambridge, supra,* at 610:

> ". . .we believe a court would ordinarily find it difficult or impossible to decide whether illegal practices had occurred of such gravity as to render the local officials answerable in damages without first ascertaining the correctness of the assessment, a question which both comity and common

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[7]Several other courts have considered the issue of "damages" in this context but in conjunction with prayers for equitable relief. See *Hickman* v. *Wujick,* 488 F.2d 875 (2nd Cir. 1973); *Horn* v. *O'Cheskey,* 378 F.Supp. 1280 (D. N.M. 1974); *Evangelical Catholic Communion, Inc.* v. *Thomas,* 373 F.Supp. 1342 (D. Vt. 1973).

sense indicate is for the state tribunals." See also *Fair Assessment in Real Estate Inc.* v. *McNary, supra.*

The contention of Petitioners that, "the district court's determination of liability requires only that it examine the facts relating to each individual tax official, as to whether there was sufficient personal involvement and malice to sustain a claim against him under §1983" puts the cart before the horse in the determination of liability. The initial question which must be reached by any court considering the matter is whether the taxing process has harmed Petitioners in a constitutional sense, which obviously requires an inquiry into the taxation process itself. It is only after that determination is made that the personal involvement of individual taxing officials becomes relevant.

It is apparent, after examination of the persuasive judicial holdings construing §1341 as a broad pronouncement of federal court non-interference in state taxation matters, that the court's reasoning in *Fulton Market Cold Storage Co.* v. *Cullerton, supra,* is misdirected. The court in *Fulton Market* ignored the broader purpose of §1341 and instead focused upon the language of the Tax Injunction Act as countenanced against a limited examination of the legislative history. The court in *Fulton Market* also took a simplistic approach in its analysis of the pertinent issues that are necessary for a determination of liability and damages in a §983 action, which approach Petitioners adopt. The Court in *Fulton Market* found that becauase there was no state statute or regulation in question, or anticipatory relief requested, the court's determination of liability would not interfere with the state taxing process. This is a rather naive view, as a §1983 action will necessarily involve the federal court intimately with the complex process of the *application* of various state statutes and regulations to the individual taxpayer.

Likewise, the court's analysis of a §1983 action ignored the very nature of that action which is the availability of a §1983 action prior to any exhaustion of administrative or state remedies

even if those remedies are found to be adequate. Wilwording v. *Swenson, Warden,* 404 U.S. 249 (1971); *Monroe* v. *Pape,* 365 U.S. 167 (1961); *Carter* v. *Stanton,* 405 U.S. 669 (1972). Thus, the court in *Fulton Market* ignored the procedural aspects of a §1983 action in its analysis. It is not difficult to imagine the disruptive effect a §1983 damage action will have in state taxation matters since that action may be brought *prior to* an attempted exhaustion of admininstrative and state remedies which may be otherwise wholly adequate. This will be treated further in Point V.

Respondents do not take issue with Petitioners' argument that a damage remedy under §1983 is "a vital component of any scheme for vindicating cherished constitutional guarantees' ". *Gomez* v. *Toledo,* 446 U.S. 635, 639, quoting *Owen* v. *City of Independence,* 445 U.S. 622, 651 (1980). However, this court's holding that §1341 bars damage actions in federal court would not infringe upon Petitioners' right to bring such an action to vindicate those rights in state court. §1341 bars actions in federal court only where "*a plain, speedy and efficient remedy may be had in the courts of such state.*" Petitioners may pursue their §1983 action in state court with review ultimately before this court. *Huffman* v. *Pursue Ltd.,* 420 U.S. 592 (1975). If Petitioners do not have a plain, speedy and efficient remedy in state court, §1341 does not act as a bar to such an action. The district court, in the case at bar, specifically found that Petitioners did have an available state remedy.[8] *Fair Assessment in Real Estate Association, Inc.* v. *McNary, supra,* at 1234, Pet App. A-8.

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[8] A taxpayer disssatisfied with his assessment made pursuant to Section 137.115(1) R.S.Mo. 1978, may appeal to the County Board of Equalization. Section 137.385 RSMo. 1978. Further appeal is provided under section 138.430 R.S.Mo. 1978 to the State Tax Commission of Missouri with subsequent judicial review to the Circuit Court, Court of Appeals and Supreme Court of Missouri. Sections 536.100, 536.140(6).

Thus, affirming the district court's holding that §1341 bars Petitioners' damage action is consistent with the broad prophylactic purposes of the Act while not foreshortening the remedies available to Petitioners.

Petitioners' final argument in Point IV of their Brief may be disposed of simply. Petitioners, by repetition rather than analysis, attempt to restrict the bar of §1341 to equitable actions by raising prior decisions of the court as conclusive on the issue. However, in the cases cited by Petitioners, "from *Great Lakes* to *Rosewell*," the court has only considered the issue of federal jurisdiction in state tax matters within the context of equitable actions. If this court has never indicated that §1341 might apply to bar actions at law for damage, as Petitioners assert, it is quite simply because the court has not previously been asked. The court in *Rosewell* specifically refused to find that post-Act cases did more than confirm that " 'The statute has its roots in equity practice,' " thus leaving open the very question now before the court. 101 S.Ct. at 1235, citing *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976).

It is of interest to note the expansive language from *Tully* v. *Griffin Inc., supra,* which Petitioners cite purportedly in support of their contention that the act should be limited to actions in equity. The court in *Tully* found that "the statute has its roots in equity practice, *in principles of federalism, and in recognition of the imperative need of the State to administer its own fiscal operations.*" 429 U.S. at 73 (emphasis added). It is the last consideration that this court in *Rosewell* at 1233, concluded wsa the principal motivating force behind the Act: "this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important

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Additionally, as cited by the District Court in *Fair, supra,* a taxpayer may bring an action such as was brought in *Breckenridge Hotels Corp.* v. *Leachman,* 571 S.W.2d 251 (Mo banc 1978) pursuant to Section 139.031 R.S.Mo. 1978, raising the same issues as Petitioners allege in their complaint.

a local concern as the collection of taxes". From the roots, the natural fruition of the Act is to bar Petitioners' damage action.

V. Barring An Action For Damages Is Within The Broad Purposes Of §1341

Consistent with the conclusion of the courts that have barred actions for damages under §1341, that to permit damage actions against state taxing officials will defeat the broad purposes of the act as previously enumerated. As the district court stated in *Fair Assessment in Real Estate Association Inc.* v. *McNary*, 478 F.Supp. 1231 (E.D. Mo. 1979) *aff'd*, 622 F.2d 415 (8th Cir. 1980) Pet. App. A-4:

> "To allow such suits would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief. State tax collection officials could be summoned into federal court to defend their assessments against claims for refunds as well prayers for punitive damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property. Allowance of such claims would result in this Court being a source of appellate review of all state property tax classifications. This Court can not condone such a result" at 1233-34. Pet. App. A-7

It is to bar the injection of the federal courts into state taxation matters which is the primary purpose of §1341. The long-standing deference to the states in matters of state and local financing differentiates federal court treatment of actions which seek to disrupt those matters from other damage actions brought against those same officials or officials similarly situated. Damage actions brought against these same state or local public officials in such areas as employment, the exercise of police powers, and regulation of private enterprises have never been accorded a similar deference because these matters concerned the exercise by public officials of duties which were not essential to the very existence of state government. The basis for federal

court deference in state taxation matters is rooted in the concern for the preservation of the sovereignty of the states which, in turn, is dependent upon the preservation of the state taxation system and the implementation of that system by public officials. Thus the barring of damage actions against state taxing officials is consistent with prior precedent which embodies the principles of federalism, comity and abstention in matters of state taxation. See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 542. n. 6 (1972); *Perez* v. *Ledesma*, 401 U.S. 82, 127 N. 17 (1971); *Matthews* v. *Rodgers*, 284 U.S. 521, 525 (1932).

Where there is no indication that Petitioners' federal rights will not otherwise be preserved, the federal courts must show scrupulous regard for the possible interference with the independence of state governments by the maintenance of actions that so threaten. *Matthews* v. *Rodgers, supra,* at 525. Petitioners' action is such an action.

This is all the more apparent in taking the analysis of Petitioners' damage action one step further. Although Petitioners stress that their action is brought against the taxing officials individually, it would be ludicrous to take the position that the tax officials were performing their respective functions in something other than their official capacity. The Respondents' actions were identifiable with the policy and practices of the governments for whom they were acting.

Lastly, because there is no exhaustion requirement as a prerequisite to the bringing of a §1983 damage action, there is the potential for §1983 actions to be initiated in federal court prior to any attempt by the taxpayer to remedy the contested tax in the forum provided by state law. The usually carefully orchestrated state appeals process for the contest of tax liability (and the state officials involved in that process) will be disrupted. Tax officials will necessarily become entangled not only in the state appeals process but will be required to defend the taxation process and procedures in federal court, without having the opportunity to correct a possibly erroneous tax. This

is the very evil which the Act was intended to prevent - interference with state tax matters. As the Court in *Fair Assessment* at 1234, Pet. App. A-8, concluded:

> "It is clear that plaintiff's proper course for relief is through the state's channels. This court should not interfere in the legitimate interests of the state in implementing its own property tax system. Cf. *Younger, supra.* To allow a suit under the present circumstances would be doing just that."

CONCLUSION

For the reasons stated above, Respondents Gene McNary, William A. Skaggs, Edmund J. Pung, Charles T. Schneider, and Frank J. Antonio respectfully request that the order of the Court of Appeals for the Eighth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Revised Statutes Of Missouri, 1978

§137.115: Real and tangible personal property-time and manner of assessment-forms may be mailed by assessor in second, third, and fourth class counties.-1. All other laws to the contrary notwithstanding, the assessor or his deputies in all counties of this state including the city of St. Louis shall, between the first day of January and the first day of June, annually make a list of all real and tangible personal property taxable in his city, county, town or district and, except as otherwise provided in subsections 2 and 3 hereof, shall assess the property at thirty-three and one-third percent of its true value in money in the following manner: He shall call at the office, place of doing business, or residence of each person required by this chapter to list property, and require the person to make a correct statement of all taxable real property in the county owned by the person, or under his care, charge or management, and all taxable tangible personal property owned by the person or under his care, charge or management, taxable in the county, except merchandise upon which he is required to pay a license tax.

§137.385: Appeal from assessment-form-time for filing. - Any person aggrieved by the assessment of his property may appeal to the county board of equalization. An appeal shall be in writing and the forms to be used for this purpose shall be furnished by the county clerk. Such appeal shall be lodged with the county clerk as secretary of the board of equalization before the third Monday in June; provided, that the board may in its discretion extend the time for filing such appeals.

§138.430: Right of appeal-investigation. - Every owner of real property or tangible personal property and every merchant and manufacturer shall have the right of appeal from the local boards of equalization under rules prescribed by the state tax commission. Said commission shall investigate all such appeals

and shall correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious.

139.031. Payment of taxes under protest - action, when commenced, how tried - refunds, how made - interest not allowed. -1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based, and shall further cite any law, statute, or facts on which he relies in protesting the whole or any part of such taxes.

2. The collector shall disburse to the proper official all portions of taxes not so protested, and he shall impound in a separate fund all portions of such taxes which are so protested. Every taxpayer protesting the payment of taxes, within ninety days after filing his protest, shall commence an action against the collector by filing a petition for the recovery of the amount protested in the circuit court of the county in which the collector maintains his office. If any taxpayer so protesting his taxes shall fail to commence an action in the circuit court for the recovery of the taxes protested within the time herein prescribed, such protest shall become null and void and of no effect, and the collector shall then disburse to the proper official the taxes impounded, as hereinabove provided.

3. Trial of the action in the circuit court shall be in the manner prescribed for nonjury civil proceedings, and after determination of the issues, the court shall make such orders as may be just and equitable to refund to the taxpayer all or any part of the taxes paid under protest or to authorize the collector to release and disburse all or any part of the impounded taxes. Either party to the proceedings may appeal the determination of the circuit court.

4. All the county collectors of taxes, and the collector of taxes in any city not within a county, shall, upon written application of a taxpayer, refund any real or tangible personal property tax mistakenly or erroneously paid in whole or in part to the collector. Such application shall be filed within one year after the tax is mistakenly or erroneously paid. The county court, or other appropriate body or official, shall make available to the collector funds necessary to make refunds under this subsection by issuing warrants upon the fund to which the mistaken or erroneous payment has been credited, or otherwise.

5. No taxpayer shall receive any interest on any money paid in by him either erroneously or under protest.

§536.100: Party aggrieved entitled to judicial review. - Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in Sections 536.100 to 536.140, unless some other provision for judicial review is provided by statute; provided, however, that nothing in this chapter contained shall prevent any person from attacking any void order of an agency at any time or in any manner that would be proper in the absence of this section. Unreasonable delay on the part of any agency in deciding any contested case shall be grounds for an order of the court either compelling action by the agency or removing the case to the court for decision.

§536.140. - Scope of judicial review - Judgment - appeals. -1. The court shall hear the case without a jury and, except as otherwise provided in subsection 4, shall hear it upon the petition and record filed as aforesaid.

* * *

6. Appeals may be taken from the judgment of the court as in other civil cases.

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CLERK

No. 80-427

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., et al.,
Petitioners,

v.

GENE McNARY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE EIGHTH CIRCUIT

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I

QUESTIONS PRESENTED[1]

Whether the petitioners' characterization of their lawsuit as one based upon the provisions 42 U.S.C. § 1983 citing interference with their property rights as an alleged result of overassessment of their real property situated in St. Louis County is sufficient to circumvent the jurisdictional bar of 28 U.S.C. § 1341.[2]

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[1]The question framed by the petitioners is unacceptable to respondents Williams, Otto and Snyder because it would require the Court to assume that the complaint of petitioners, dismissed by the United States District Court for the Eastern District of Missouri, constituted "a suit at law for damages" whereas these respondents take the position that the suit filed by the petitioners in the District Court was in reality a complaint for refund of state property taxes paid.

[2]The caption of this case in this Court, as set forth in the "Brief for Petitioners" contains the names of all parties to this proceeding in the United States District Court for the Eastern District of Missouri and in the United States Court of Appeals for the Eighth Circuit. Therefore, Supreme Court Rule 34.1(b) has been satisfied.

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No. 80-427

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., et al.,
Petitioners,

v.

GENE McNARY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS WILLIAMS, OTTO AND SNYDER

STATEMENT OF THE CASE

On June 2, 1979, the petitioners filed this action in the United States District Court for the Eastern District of Missouri (J.A. 3-14). The complaint alleged that the petitioners had been deprived of their rights to due process of law and the equal protection of the law because of the following practices of all respondents:

> "(a) Properties with newly constructed improvements hereinafter referred to as 'new homes' are taxed upon roughly 33 1/3% of current true market value even though properties with older improvements, hereinafter referred to as 'old homes' are taxed, on average, upon approximately 22% of current market value.

> (b) Owners of residential property who exercise their right under state law to appeal the St. Louis County tax assessor's evaluation, and are successful, are specifically targeted for reassessment the following year." (J.A. 3-4).

The petitioners based their action upon the cause of action provisions of 42 U.S.C. § 1983 and upon the jurisdictional provisions of 28 U.S.C. § 1331 and § 1343(3). The complaint sought monetary relief upon those federal statutory bases. In essence, the petitioners sought monetary relief for alleged overpayments of their real property taxes in the years 1975 through 1979. The petitioners contended in their complaint that they had made these overpayments due to overassessments by the respondents during these tax years. The compensatory damages requested represent, exactly, the difference between the amount paid in property taxes in the years 1975 through 1979 based upon an alleged over-assessment of real property and the amount which petitioners allegedly would have paid in property taxes had their homes been assessed at a value representing the St. Louis County average rate of assessed evaluation (J.A. 6-7, 10, 13). Therefore, the amount of compensatory damages requested in this lawsuit represents an attempt to secure a state tax refund in the federal courts. The petitioners also sought punitive damages in the sum of $25,000 from each of the respondents (J.A. 13). As their prayer for relief on the second count of their complaint, alleging that owners of residential property exercising their right under state law to appeal the St. Louis County tax assessor's evaluation of their property are specifically targeted for reassessment the following year, plaintiffs' requested compensatory damages in the amount of $500 against each respondent and punitive damages in the amount of $50,000 against each respondent (J.A. 13-14). The petitioners wholly failed to specify how they were

actually damaged by $500 through the acts of each of the individuals named as defendants. Respondents Williams, Otto and Snyder, members of the Missouri State Tax Commission during calendar year 1978 and who are represented by this brief on the merits, were not alleged to have done any specific act in punishing plaintiffs for exercising their right to appeal their assessments.

On August 13, 1979, respondents McNary, Skaggs, Antonio, Pung and Schneider filed their motion to dismiss the petitioners' complaint with suggestions in support thereof (J.A. 15-17). One of the bases for that motion to dismiss was that the federal district court lacked jurisdiction due to the provisions of 28 U.S.C. § 1341. On August 17, 1979, respondents Williams, Otto and Snyder filed their answer to the complaint of the petitioners. In their answer, respondents Williams, Otto and Snyder also moved to dismiss petitioners' complaint for failure to state a cause of action upon which relief could be granted as to them.

On September 19, 1979, the petitioners filed a memorandum in oposition to the motion to dismiss of respondents McNary, Skaggs, Antonio, Pung and Schneider. Thereafter, on October 5, 1979, respondents McNary, Skaggs, Antonio, Pung and Schneider filed a reply to the petitioners suggestions in opposition to their motion to dismiss.

On November 7, 1979, Judge John F. Nangle of the United States District Court for the Eastern District of Missouri, Eastern Division, entered his memorandum and order dismissing the complaint of the petitioners in its entirety. 478 F.Supp. 1231 (E.D.Mo. 1979), printed in the appendix of the petition for writ of certiorari at pages A-3 through A-9. Judge Nangle found that the relief sought by the individual petitioners, actual damages to bring their

tax payments into line with those of other taxpayers, was in fact a request for a refund of the alleged overpayments of property taxes. *Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 478 F.Supp. 1231, 1233 (E.D.Mo. 1979). He concluded that the Tax Injunction Act, Title 28 U.S.C. § 1341, bars suits for refunds as well as those for anticipatory relief. We quote:

> "To allow such suits would cause disruption of the states' revenue collection systems equal to that cause by anticipatory relief. State tax collection officials could be summoned into federal court to defend their assessments against claims for refunds as well as prayers for punitive damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property. Allowance of such claims would result in this Court being a source of appellate review for all state property tax classifications. This Court can not condone such a result." *Id.* at 1233-1234.

Judge Nangle also found that the subject of state property taxation was appropriate for the application of the principles of comity and federalism announced by this Court in *Younger* v. *Harris*, 401 U.S. 37 (1971). It should be emphasized that the citation by the district judge of *Younger* was ancillary to his specific holding that the Tax Injunction Act bars suits in federal courts for refunds of state property taxes. As such, the citation to *Younger* probably constitutes dicta.

The District Court found it undisputed that the petitioners had sufficient means to rectify what they considered an unjust property tax assessment situation via state judicial processes. *Id.* at 1234. The petitioners do not challenge the finding of the District Court that Missouri state processes were sufficient for the presentation of petition-

ers' claims concerning the assessment of real property in St. Louis County. It is clear that the state remedies available to the petitioners are plain, adequate and complete. State remedies do exist allowing the plaintiffs the opportunity to raise their claims of overpayment due to alleged overassessment in prior tax years. In addition, in a lawsuit filed by the individual petitioners in this case in the state courts of Missouri, the Missouri Supreme Court did find that the property tax assessments of St. Louis County were inequitable and directed the Missouri State Tax Commission to supervise St. Louis County officials to ensure that all property was properly reassessed. *State ex rel. Cassilly* v. *Riney,* 576 S.W.2d 325 (Mo. banc 1979). As a result of that Supreme Court decision, prompted by the petitioners' lawsuit, the Missouri State Legislature enacted statutes to fund and direct the general reassessment of all taxable real property within the several counties of the State of Missouri and gave the Missouri State Tax Commission authority to enforce and direct that general reassessment. See for example, Section 137.720, RSMo Supp. 1980 and Section 137.750, RSMo Supp. 1979. Therefore, as the petitioners do not contradict, not only are Missouri state remedies plain, adequate and complete, but petitioners, specifically, have been largely successful in remedying the inequities of real property evaluation and assessment in St. Louis County as a result of previous state court litigation.

On June 19, 1980, the United States Court of Appeals for the Eighth Circuit, en banc, affirmed the judgment of the District Court. 622 F.2d 415 (8th Cir. 1980), set forth in the petition for certiorari at pages A-1 to A-2. No separate opinion was issued by the Court of Appeals at the time of affirmance and the case was affirmed by an equally divided appellate court sitting *en banc.*

SUMMARY OF ARGUMENT

This case presents the issue of whether a § 1983 complaint for actual and punitive damages, in which the "actual damages" clearly consist of a request for a refund of state property taxes paid in previous years, may or should be entertained in the federal courts. The District Court, affirmed without opinion by the Court of Appeals, dismissed the complaint finding it was barred by the Tax Injunction Act, 28 U.S.C. § 1341. The District Court also cited *Younger* v. *Harris*, 401 U.S. 37 (1971), and the principles of comity, federalism and absention set forth therein, although that court clearly found § 1341 to be a jurisdictional bar. It is submitted that the Court is not limited to a construction and application of § 1341, however. The dismissal by the District Court should also be judged against a backdrop of consistent judicial precedent restricting federal court jurisdiction over matters of state taxation.

I. If the Tax Injunction Act applies to the factual and legal allegations in petitioners' complaint, the District Court was barred from entertaining jurisdiction notwithstanding the fact that petitioners purported to file under a Reconstruction civil rights statute of expanding precedential importance. 42 U.S.C. § 1983. In finding § 1983 applicable to alleged deprivations of property rights, the Court reaffirmed a long line of cases restricting federal court jurisdiction over state tax matters, *Lynch* v. *Household Finance Corporation*, 405 U.S. 538 (1972), as "a subject governed by unique considerations . . ." in which the Court has "repeatedly barred anticipatory federal adjudication." Where § 1983 and § 1341 conflict, the jurisdictional bar of the latter must prevail. *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221 (1981); *Bland* v. *McHann*, 463 F.2d 21 (5th Cir. 1972); *American*

Commuter's Association v. *Levitt,* 405 F.2d 1148 (2nd Cir. 1969).

II. The District Court appropriately dismissed the complaint, apart from the bar of § 1341, on the basis of a distinct line of Supreme Court cases limiting federal jurisdiction over matters of state taxation. In effect, a separate line of precedent, in the nature of comity and federalism concepts, dictated dismissal.

In a case precisely on point, the Court declined to reach the merits of a case in which a taxpayer was seeking damages, similar to a tax refund, due to an allegedly unconstitutional property assessment and evaluation, some thirteen years before Congress enacted the Tax Injunction Act. *First National Bank* v. *Board of County Commissioners,* 264 U.S. 450 (1924). Again before the enactment of § 1341, the Court refused to enjoin state tax collection because of its "scrupulous regard for the rightful independence of state governments . . . and a proper reluctance to interfere by injunction with their fiscal operations. . . ." *Matthews* v. *Rodgers,* 284 U.S. 521 (1932).

After 1937 when § 1341 was enacted, the Court continued to exercise restraint in reviewing state tax cases whether or not the Act specifically barred jurisdiction. Therefore, the Court has refused to entertain suits for declaratory judgments seeking declarations of unconstitutionality of state tax statutes even though § 1341 does not specifically refer to declaratory relief. *Great Lakes Dredge & Dock Company* v. *Huffman,* 319 U.S. 293 (1943).

Therefore, there is substantial precedent for affirming the lower courts even if § 1341 is found not to apply in this case.

III. Rightfully, the federal courts have found the Tax Injunction Act a jurisdictional bar in a broader category of cases than just those seeking injunctive relief.

Unanimously, those federal courts confronted with the issue have found § 1341 to bar actions for declaratory judgment. Without relying precisely on § 1341, this Court has reached the same result. *Great Lakes Dredge & Dock Company* v. *Huffman, supra.*

The better reasoned decisions of lower federal court have also found § 1341 to be a jurisdictional bar to suit for tax refunds and damages. Judge Frank Johnson, respecting a suit for damages arising out of state taxation, logically found that damages, and especially punitive damages, like requests for anticipatory relief, are still "designed to deter collection of the taxes" assessed by state and local tax officials. *Advertiser Company* v. *Wallace,* 446 F.Supp. 677 (N.D.Ala. 1978).

IV. However petitioners chose to denominate their prayer for relief, clearly what is being sought is a refund of property taxes paid in previous years. The "actual damages" they claim are measured by the difference in what they paid in property taxes from 1975-1979 and what they allege they should have paid. Once the inescapable conclusion is reached that this is a tax refund case, the application of § 1341 and Supreme Court precedent to bar federal court jurisdiction is mandated. The District Court properly relied on *Kelly* v. *Springett,* 527 F.2d 1090 (9th Cir. 1975) and *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972) in so holding. An action for a refund is an integral part of state tax administration, and § 1341 should be read as a broad restriction on federal jurisdiction in suits that impede state tax administration. Do petitioners really believe that a suit for damages against state and local tax officials, seeking recovery of an alleged overpayment of taxes, will not interfere with the fiscal process of tax collection and deter tax officials from performing their duties to assess, levy and collect taxes?

V. This term, the Court refused to entertain, on the merits, a lawsuit alleging deprivation of Fourteenth Amendment property rights where the plaintiff had refused to avail himself of complete and adequate state tort remedies. *Parratt* v. *Taylor*, ____ U.S. ____, 49 U.S.L.W. 4509 (1981). The same principle should be applied to state tax refund cases, especially in light of the historical reluctance of the Court to interfere in state tax matters, because, as petitioners do not dispute, there is a plain, speedy, efficient and complete Missouri remedy to redress their grievances.

This lawsuit is especially litigious since these very parties have successfully fought for a general reassessment of property taxes in St. Louis County in the courts of Missouri. In addition, the state legislature has followed the lead of the Missouri Supreme Court by enacting legislation to fund, coerce, and supervise the reassessment process.

VI. It is not logically consistent that the Tax Injunction Act should bar suit by taxpayers who have refused to pay taxes and seek to enjoin the collection thereof, but does not, as petitioners argue, bar suit by taxpayers who have paid taxes under protest and wish to seek refunds in the federal courts. In both situations, the same threshold issue must be determined, *i.e.*, is the tax assessment, levy or collection constitutional. In its most recent pronouncement on the subject the Court determined that § 1341 did apply to the taxpayer refusing to pay even though state processes for redress were less than perfect. *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221 (1981). It should also apply to the taxpayer who pays, having a similar underlying disenchantment with the taxing procedure, and wants a federal forum.

The issue before the Court, therefore, is whether the

Tax Injunction Act and *stare decisis* should apply to a complaint alleging an unconstitutional tax assessment, pursuant to § 1983, and seeking a tax refund denominated as damages. The answer must be in the affirmative. To hold otherwise would make the federal courts an integral part of the state taxation process and require their approval of state tax law and procedure each time a taxpayer believes he has been taxed unfairly by state and local officials. Surely, Congress could not have intended § 1983 to make state tax courts out of the federal judiciary. Such an immense expansion in federal court jurisdiction is not only unwarranted legally but imprudent as well.

ARGUMENT

I.

It is clear that when a complaint alleging federal court jurisdiction under § 1983 collides full force with the specific congressional limitation on federal jurisdiction embodied by § 1341, the limitation on federal jurisdiction must prevail.

The petitioners filed a complaint in the United States District Court for the Eastern District of Missouri alleging a cause of action under Title 42 U.S.C. § 1983 and its jurisdictional counterpart, Title 28 U.S.C. § 1343(3). Despite the important historical ramifications of §1983 as the vehicle by which the deprivation of federally protected rights are to be redressed, and the apparently expanding parameters of § 1983 jurisprudence,[3] nevertheless, the Tax Injunction Act, Title 28 U.S.C. § 1341, precludes an exercise of jurisdiction by the federal courts over the facts alleged in the petitioners' complaint.

The respondents do not dispute that petitioners can, or perhaps more precisely could, state a theoretical cause of action invoking the necessary elements of a § 1983 lawsuit. Even though the constitutional right asserted by the petitioners in their complaint was clearly an allegation of a property right deprivation (inequities in St. Louis County real estate assessment and taxation which allegedly resulted in their paying more property taxes than they should have been required to pay), a § 1983 case can be asserted for the deprivation of property rights absent a specific jurisdictional impediment. See *Lynch* v. *Household Finance Corporation*, 405 U.S. 538 (1972). However, in extending § 1983 to

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[3]See *Maine* v. *Thiboutot*, ____ U.S. ____, 100 S.Ct. 2502 (1980); *Owen* v. *City of Independence*, 445 U.S. 622 (1980); *Gomez* v. *Toledo*, 446 U.S. 635 (1980); and *Lynch* v. *Household Finance Corporation*, 405 U.S. 538 (1972).

include alleged deprivations of property rights, this Court took care to reaffirm the validity of its previous decisions restricting federal court jurisdiction over matters involving the collection of state taxes. In doing so, the Court clarified the proper relationship between § 1983 and § 1341. At footnote 6 of the *Lynch* opinion, the Court stated in reference to cases which had been cited by the respondents in support of a "personal rights distinction":

> "All of these cases involve constitutional challenges to the collection of state taxes. Congress has treated judicial interference with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly. . . ." *Id.* at 542 n.6.

After quoting § 1341, the *Lynch* opinion, same footnote, continued:

> "We have repeatedly barred anticipatory federal adjudication of the validity of state tax laws. [Citation omitted]. The decisions cited by respondents may, therefore, be seen as consistent with congressional restrictions of federal jurisdiction in this special class of cases, and with longstanding judicial policy." *Id.*

The Tax Injunction Act imposes clear limitations on federal court jurisdiction which may not be avoided by an attempt to state a cause of action under § 1983. Where these two federal statutory sections conflict, the specific limitations of § 1341 must prevail. *Rosewell* v. *LaSalle National Banks*, ____ U.S. ____, 101 S.Ct. 1221 (1981). *Bland* v. *McHann*, 463 F.2d 21, 25 (5th Cir. 1972); *American Commuter's Association* v. *Levitt*, 405 F.2d 1148, 1151 (2nd Cir. 1969). Therefore, if § 1341 applies to the factual and legal allegations of the petitioners' complaint, then the District Court was manifestly correct in dismissing the complaint on the basis of that federal court jurisdictional bar.

II.

The petitioners' complaint was appropriately dismissed, completely aside from the existence of § 1341, and the district judge appropriately referred to the principles of comity which dictate such result.

The passage by Congress, in 1937, of the Johnson Act, now Title 28 U.S.C. § 1341, did not introduce a new concept into federal court jurisdictional concepts. The district judge specifically referred to *Younger* v. *Harris,* 401 U.S. 37 (1971). However, justification for a federal court not entertaining jurisdiction over matters of state taxation, particularly susceptible to resolution via state processes, need not be based on any of the general abstention doctrines. Quite aside from the precepts of *Burford, Pullman* and *Younger* abstention, there is a separate and distinct line of federal cases justifying a limitation of jurisdiction over state tax matters where there are plain, adequate and speedy remedies available in the state system.

Federal judicial restraint in matters of state tax administration was announced by this Court substantially before Congress found it necessary to enact § 1341. *First National Bank* v. *Board of County Commissioners,* 264 U.S. 450 (1924), is particularly apropos to this case. There, the Court was faced with an action to recover the amount of certain state taxes on the claim of a taxpayer that its property (shares in a bank) had been assessed upon an evaluation grossly in excess of the value of property of other similar taxpayers in separate counties of the state. As in this case, the taxpayer contended in this Court that taxes were assessed and collected in contravention of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In that case, as in this one, the taxpayer was suing to recover taxes alleged to have been illegally exacted, that is, the petitioner was seeking a tax refund. This Court af-

firmed the judgment of the district court holding that it was precluded from reaching the merits of the complaint because taxpayers had not availed themselves of the adequate state remedy. *Id.* at 455-456. This case is precisely on point, representing precise judicial precedent for affirmance of this case.

In another case, also decided before the enaction of § 1341, a taxpayer sought a federal forum to adjudicate the constitutional validity of certain state tax collections. In *Matthews* v. *Rodgers*, 284 U.S. 521 (1932), this Court determined, without § 1341 being available to it, that it should not enjoin the collection of state taxes where there were plain, adequate and complete state remedies.

It is clear, therefore, that the enaction by Congress of the Tax Injunction Act hardly constituted a revolution. In point of fact, the statute merely codified existing Supreme Court precedent. Also, this Court has continued to exercise restraint in dealing with state tax matters without necessarily relying upon § 1341.

After the enactment of § 1341, the Court decided *Great Lakes Dredge & Dock Company* v. *Huffman*, 319 U.S. 293 (1943). In that case, the Court was asked to issue a declaratory injunction that a certain state tax was unconstitutional. Acknowledging that § 1341 did not expressly include declaratory relief within its ambit, the Court nevertheless withheld declaratory relief, quite apart from any jurisdictional bar implicit in the Tax Injunction Act, relying on *Matthews* v. *Rodgers, supra*, and holding that where a "plain, adequate and complete" state remedy existed, the taxpayer must go to the state courts with ultimate review in the Supreme Court. *Id.* at 297.

The Court reaffirmed its policy of restraint in interferring with a state's collection of its revenue, as embodied

both in pre- and post- § 1341 judicial precedent, in *Tully* v. *Griffin*, 429 U.S. 68 (1976).

In its most recent case interpreting the Tax Injunction Act, the Court appeared, in footnotes, to reaffirm the concept that federal courts may withhold relief in cases involving matters of state taxes even if the Tax Injunction Act is not specifically applicable. *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221, 1229 n.15, 1235 n.33 (1981).

Therefore, apart altogether from the jurisdictional bar of § 1341, a consistent and substantive line of Supreme Court cases support the decision of the District Court to dismiss the complaint of the petitioners in this case.

> "The scrupulous regard for the rightful independence of state governments which should at all time actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved. . . ." *Matthews* v. *Rodgers*, *supra*, 284 U.S. at 525-526.

The above-stated quotation from *Matthews* was cited by the Court with approval in *Great Lakes Dredge & Dock Company* v. *Huffman*, *supra*, 319 U.S. at 298, a case which did not involve mere injunctive relief but a request for a declaratory judgment.

III.

Federal courts have not found the jurisdictional bar of § 1341 limited only to suits seeking injunctive relief.

The Tax Injunction Act provides that a district court "shall not enjoin, suspend or restrain" matters pertaining to state taxes. The petitioners have emphasized that the plain meaning of that statute would apparently include within its ambit only purely equitable cases seeking injunctive relief. The logical extension of the arguments made by the petitioners would lead to the conclusion that only those complaints seeking to enjoin the enforcement of state tax statutes or practices are barred by § 1341.

Although the statute appears only to mention injunctive relief, it has long been the position of the lower federal courts that the statute's prohibition extends to declaratory relief as well. See *Coon* v. *Teasdale*, 567 F.2d 820 (8th Cir. 1977); *Aluminum Company of America* v. *Department of the Treasury of the State of Michigan*, 522 F.2d 1120 (6th Cir. 1975); *Ford Motor Credit Company* v. *Louisiana Tax Commission*, 440 F.2d 675 (5th Cir. 1971); *Green* v. *Klinkofe*, 422 F.Supp. 1021 (N.D.Ind. 1976); *Fulton Market Cold Storage* v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979).

More persuasively, this Court, after the enactment of § 1341, declared itself unwilling to entertain declaratory judgment suits challenging the constitutionality of state tax statutes where adequate state administrative and judicial remedies existed. We quote from *Great Lakes Dredge & Dock Company* v. *Huffman*, 319 U.S. 293, 298, 299 (1943):

> "Congress recognized and gave sanction to this practice of federal quity courts by the Act of August 21, 1937, 50 *Stat 738, c 726, enacted as an amendment to § 24 of the Judicial Code, 28 USCA § 41(1), 8 FCA title 28, § 41(1) [§ 1341]. This provides that 'no dis-

trict court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or inequity in the courts of such State.' The earlier refusal of federal courts of equity to interfere with the collection of state taxes unless the threatened injury to the taxpayer is one for which the state courts afford no adequate remedy, and the confirmation of that practice by Congress, have an important bearing upon the appropriate use of the declaratory judgment procedure by the federal courts as a means of adjudicating the validity of state taxes.

It is true that the Act of Congress speaks only of suits 'to enjoin, suspend, or restrain the assessment, levy, or collection of any tax' imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure."

A number of federal courts have extended the bar of § 1341 to cases seeking a refund of taxes paid in previous tax years. See *United States* v. *State Tax Commission of the State of Mississippi*, 505 F.2d 633 (5th Cir. 1974); *Gray* v. *Morgan*, 371 F.2d 172 (7th Cir. 1966); *Evangelical Catho-*

lic Communion, Inc. v. *Thomas,* 373 F.Supp. 1342 (D.Vt. 1973), *aff'd,* 493 F.2d 1397 (2nd Cir. 1974); *Natural Gas Pipe Line Company of America* v. *Sergeant,* 337 F.Supp. 88 (D.Kans. 1972); *Kelly* v. *Springett,* 527 F.2d 1090 (9th Cir. 1975); and *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972), *cert. denied,* 410 U.S. 966 (1973).

Although respondents Williams, Otto and Snyder believe that Judge Nangle's characterization of the plaintiffs' lawsuit as one for a refund, warranting the application of § 1341, several federal courts have held specifically that suits for damages filed pursuant to Title 42 U.S.C. § 1983 are barred by the precepts of § 1341. *Advertiser Company* v. *Wallace,* 446 F.Supp. 677 (N.D.Ala. 1978); *Ludwin* v. *City of Crambridge,* 592 F.2d 606 (1st Cir. 1979); *Hickmann* v. *Wujick,* 488 F.2d 875 (2nd Cir. 1973); *Horn* v. *O'Cheskey,* 378 F.Supp. 1280 (D.N.M. 1974); and *Evangelical Catholic Communion, Inc.* v. *Thomas, supra.* In the *Advertiser Company* case, Judge Frank Johnson addressed the request for monetary damages in the plaintiff's complaint as follows:

> "Arguably, the case law leaves open the precise issue presented here—i. e., whether a Section 1983 action seeking only compensatory and punitive damages is barred by Section 1341. Yet, the same policies which precluded awarding anticipatory relief or a refund should also preclude an award of the damages sought in this case. Although perhaps less coercive than anticipatory relief and less intrusive than a refund, the damage award plaintiff seeks, especially its request for punitive damages, still is designed to deter collection of the taxes now being assessed by defendants. . . ." *Advertiser Company* v. *Wallace, supra* at 679-680.

Therefore, it is clear that many of the lower federal courts, and this Court as well, have refused to entertain

lawsuits challenging matters of state taxation wherein the relief sought was *not* purely injunctive.

IV.

The relief sought by petitioners can clearly be characterized as a suit for a refund of taxes paid in previous years which is barred by § 1341.

The petitioners contend at length, but without persuasion, that the relief they seek amounts to damages against each of the respondents individually and not a refund of taxes paid in previous years. Petitioners' protestations that the relief they seek, denominated by them as actual and punitive damages, is not a tax refund, are, to borrow from William Shakespeare, "full of sound and fury, signifying nothing."

The petitioners seek "damages" against the county defendants for the years 1975, 1976, and 1977, in the amounts of $753, $754 and $1048 respectively. The petitioners seek "damages" against all defendants, including the members of the Missouri State Tax Commission represented on this brief, for the years 1978 and 1979 in the amount of $1223 for each year. The petitioners then tag on a request for punitive damages to their prayer for relief on the first count of the complaint (J.A. 13). These "actual damages" equal exactly the difference between what petitioners paid in real estate property taxes for the years 1975 to 1979 inclusive and what they alleged they should have paid had their home been assessed at a value commensurate with the St. Louis county-wide average of assessed evaluation. How can it reasonably be claimed that these "damages" do not equate to a request for a tax refund for taxes paid in previous years? The bogus claim for punitive damages does not alter the essential nature of the petitioners' case. Likewise, the possible nonavail-

ability of punitive damages in the state courts on a refund case does not invalidate the adequacy of "due process" afforded by Missouri in assessment cases. *Parratt* v. *Taylor*, ____ U.S. ____, 49 U.S.L.W. 4509, 4513 (1981).

We anticipate that the petitioners will point out their claim for an allegedly different type of damage in Count II of their complaint (J.A. 13-14). On that count, petitioners purport to seek $500 in actual damages against each of the respondents. Such claim is totally without substance upon its face. How can petitioners have been *actually* damaged over and above the amount of alleged excess taxes they paid? Apparently, petitioners are seeking compensation for attorneys' fees and costs arising out of state administrative proceedings, which obviously cannot be awarded by the federal courts.

Once the inescapable conclusion is reached that this is a suit for a tax refund, the application of the jurisdictional bar of § 1341 makes manifest sense. The District Court so held relying primarily upon *Kelly* v. *Springett*, 527 F.2d 1090 (9th Cir. 1975); and *Bland* v. *McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973). *Bland* is the best reasoned of the lower court cases which have considered whether the jurisdictional bar of § 1341 should be applied to tax refund cases. The plaintiffs in *Bland* were Negro property owners who charged that increases in their property tax assessments were the result of racial discrimination and in retaliation for certain prior demonstrations. They sought an injunction against increases in real property assessments on the basis of race, an injunction against the levying, assessing and collecting of real property taxes not based on constitutional and nondiscriminatory procedures, and an money judgment amounting to a tax refund plus interest. It is important to note that the plaintiffs in *Bland*, as the petitioners in the present case, framed the relief requested in terms of a § 1983 suit

for damages. The facts in that case were egregious in that the Fifth Circuit apparently assumed that the tax assessment had indeed discriminated against Blacks. *Id.* at 23. After tracing Supreme Court precedent, the court in *Bland* reached the following conclusion:

> "First National Bank v. Board of County Commissioners, supra, [264 U.S. 450 (1924)], clearly would leave taxpayers to their state remedy, if it is plain, adequate and complete. The cases involving anticipatory relief further expound upon the idea that in matters involving state tax law state remedies must be pursued where they are plain, adequate and complete. An action for a refund is an integral part of state tax administration. We see no reason to bifurcate the state remedy. Section 1341 compels the taxpayers to seek compensatory relief through a plain, speedy and efficient state remedy. An ancillary claim for a refund should properly be joined with it.
>
> Thus, based upon all of the foregoing we conclude that it is the duty of federal courts, in actions for the refund of state taxes, to defer to state adminisrative and judicial remedies where the state remedy is 'plain, speedy and efficient.' " *Id.* at 27-28.

Relying upon *Bland* v. *McHann, supra*, the Fifth Circuit reaffirmed its position that tax refunds are barred by § 1341 in *United Gas Pipe Line Company* v. *Whitman*, 595 F.2d 323 (5th Cir. 1979). Again, we quote:

> "The concept that section 1341 is not a narrow statute aimed only at injunctive interference with tax collection, but is rather a broad restriction on federal jurisdiction in suits that impede state tax administration, has continued to gain credence in the federal courts. The Supreme Court recently stated that '[t]he statute has its roots in equity practice, in principles

of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.' *Tully* v. *Griffin, Inc., supra,* 429 U.S. at 73, 97 S.Ct. at 222. . . .

United would have suits for tax refund exempted from the broad jurisdictional barrier of section 1341 on the grounds that refund suits do not restrain the actual collection of any tax and involve relatively minimal interference with state tax administration. United's contentions are foreclosed by *Bland,* and do not stand up to practical scrutiny.

. . . .

United's efforts to distinguish *Bland* are unpersuasive. United contends that since the complaint in *Bland* sought both injunctive and refund relief, the decision is not controlling in cases such as this one, where only refund relief is sought. United's distinction, however, does not account for the specific statement in *Bland* that refund suits are barred because they interfere with state tax administration. That interference is not heightened because the plaintiffs attach a prayer for injunctive relief that is patently outside the power of the federal court to provide. *Bland* rests on the principle that the judicial interpretation and enforcement of state tax law should rest with the state courts alone, and that a suit for refund is as much an interference with that function as a suit for declaratory or injunctive relief. . . ." *Id.* at 326-327.

Plaintiffs rely upon the case of *Fulton Market Cold Storage Company* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978), *cert. denied,* 439 U.S. 1121 (1979). The decision in *Fulton Market* is suspect for several reasons. First, the court began its decision by declaring the case to be one of first impression regarding the application of § 1341 to a

suit seeking the award of damages. However, no fewer than five federal courts had previously addressed this precise question, all of them rejecting attempts by plaintiffs to obtain damages pursuant to § 1983. See *Hickmann* v. *Wujick*, 488 F.2d 875 (2nd Cir. 1973); *Advertiser Company* v. *Wallace*, 446 F.Supp. 677 (M.D.Ala. 1978); *Kistner* v. *Miliken*, 432 F.Supp. 1001 (E.D.Mich. 1977); *Horn* v. *O'Cheskey*, 378 F.Supp. 1280 (D.N.M. 1974); and *Evangelical Catholic Communion, Inc.* v. *Thomas*, 373 F.Supp. 1342 (D.Vt. 1973), *aff'd*, 493 F.2d 1397 (2nd Cir. 1974). Second, the Seventh Circuit completely ignored those cases wherein federal courts had dismissed actions seeking refunds of taxes, and gave no credence whatsoever to the reasoning expressed in those opinions for applying the bar of § 1341 to this situation. Finally, Judge Sharp held in *Fulton Market* that it was necessary to allow the case to proceed since it was based on one of the civil rights statutes, 42 U.S.C. § 1983. In so doing, the court completely disregarded the plethora of federal case law to the contrary. (See Point I of the Argument section of this brief).

The other cases relied upon by the petitioners are equally unpersuasive. In the case of *Ott* v. *Mississippi Valley Barge Line Company*, 336 U.S. 169 (1949), the provisions of § 1341 were not even brought into issue. Therefore, it is absurd to contend that the Supreme Court has "held without comment," that tax refund cases are not barred by § 1341. In addition, the position of the court in *Central Steel & Wire Co.* v. *City of Detroit*, 99 F.Supp. 639 (E.D. Mich. 1951), was later rejected entirely by that same court in *Kistner* v. *Miliken, supra.* Finally, the remaining two cases relied upon by the plaintiffs, *Southland Mall, Incorporation* v. *Garner*, 293 F.Supp. 1370 (W.D.Tenn. 1968), and *Louisville and Nashville Railroad Company* v. *Atkins*, 390 F.Supp. 576 (M.D.Tenn. 1975), are clearly the minority view which should be rejected by this Court in determining

the applicability of § 1341 to this case. See 17 Wright, Miller & Cooper, Federal Practice and Procedure, § 4237 (1978).

Obviously, the petitioners' lawsuit is one for a refund for state taxes paid in previous years which should be barred by § 1341. Even if we were to accept the petitioners' nomenclature of their complaint as one for damages, the better reasoned lower court opinions support the application of the § 1341 jurisdictional bar to damage actions relating to the collection, levying and assessment of state taxes.

V.

Missouri's administrative and judicial processes provide to the petitioners a plain, speedy and efficient remedy.

The petitioners have not asserted before this Court that the remedies, available to them under Missouri law, are not plain, speedy, efficient and complete. The petitioners have simply ignored the availability of state remedies to argue that the Tax Injunction Act does not apply to limit federal court jurisdiction over a complaint stated in terms of a 1983 damage action. The recent decision of this Court in *Parratt* v. *Taylor*, ____ U.S. ____, 49 U.S.L.W. 4509 (1981), should be applied to the petitioners' tactics in this case. That is, assuming the allegations in petitioners' complaint to be true, they have not been deprived of their Fourteenth Amendment property rights without "due process of law" where the state provides a full procedure for the redress of the alleged violation.

> "It is argued that the State does not adequately protect a respondent's interest because it provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to a trial by jury. Although the state remedies may not provide the re-

spondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.

Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily resolve in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.' *Paul* v. *Davis*, 424 U.S. 693, 701. We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society." *Id.*, 49 U.S.L.W. at 4513.

The reasoning of *Parratt* is especially persuasive in view of the clear Supreme Court precedent favoring federal court restraint in matters of state taxation.

Not only have petitioners not alleged that the state remedies are inadequate, they could not successfully have done so. There can be no doubt that remedies do exist

allowing the petitioners the opportunity to raise their claims of excess taxes paid due to alleged overassessment of their property in prior tax years. See Sections 137.385, RSMo 1978; 138.110, RSMo 1978; 138.430, RSMo 1978; 139.031, RSMo 1978; 139.290, RSMo 1978; *Breckenridge Hotels Corporation* v. *Leachman,* 571 S.W.2d 251 (Mo. banc 1978); *Xerox Corporation* v. *Traves,* 529 S.W.2d 418 (Mo. banc 1975); *John Calvin Manor, Inc.* v. *Aylward,* 517 S.W.2d 59 (Mo. 1974). It has also been recognized by the Supreme Court of Missouri that claims filed pursuant to the provisions of 42 U.S.C. § 1983 are cognizable in the state courts. See *Stafford* v. *Muster,* 582 S.W.2d 670 (Mo. banc 1979); *Shipiro* v. *Columbia Union National Bank & Trust Company,* 576 S.W.2d 310 (Mo. banc 1978). In addition, these specific petitioners have already been successful in prompting a general reassessment of real property in St. Louis County. In *State ex rel. Cassilly* v. *Riney,* 576 S.W.2d 325 (Mo. banc 1979), the Missouri Supreme Court directed the Missouri State Tax Commission to supervise the reassessment of all real estate in St. Louis County. The Missouri Legislature was responsive to this opinion, and gave a newly created responsibility of supervision to the Missouri State Tax Commission, by enacting legislation to require and fund general reassessments of real estate for property tax purposes. See for example, Sections 137.720 and 137.750, RSMo Supp. 1980.

VI.

The petitioners should not be allowed to circumvent the jurisdictional bar of § 1341 as a result of the purely procedural distinction between an injunction against the enforcement of state tax laws and a tax refund against state tax officials.

In this Court's most recent opinion relating to the Tax Injunction Act, the underlying facts were remarkably

similar to those presented by this case, with the procedural posture in which the two cases reached this Court being slightly divergent. In *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221 (1981), a taxpayer in Cook County alleged that local tax officials had overassessed her property resulting in an excessive property tax. In *Rosewell* the taxpayer refused to pay the taxes and brought an action in federal court for injunctive relief against the local tax officials. As is apparent, the only real distinction between the facts in *Rosewell* and the facts in the present case are that the present petitioners paid their property taxes for the years 1975 through 1979 and now seek what is basically a refund. In *Rosewell* the Court found the action of the taxpayer barred by the Tax Injunction Act because Illinois provided a legal remedy which was "plain, speedy and efficient."

It defies logic to contend, as petitioners do, that the Tax Injunction Act bars a lawsuit to enjoin the collection or assessment of state taxes, where a taxpayer has refused to pay, but does not bar a lawsuit seeking a refund of state taxes, where the taxpayer has paid in advance of filing his federal court suit. Such a result would substitute for the administrative and judicial tax refund procedures of every state, a federal court forum to adjudicate the legality by which state and local tax officials assess, levy and collect taxes. The fiction of a 1983 suit for damages, which in reality seeks a tax refund, should not be allowed to defeat

> "[T]he principle motivating force behind the Act; this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfer with so important a local concern as the collection of taxes. 81 Cong. Rec. 1415 (1937) (remarks of Sen. Bone); *Great Lakes Dredge & Dock Co.* v. *Huffman, supra,* at 301 (Act 'predicated upon the

> desirability of freeing, from interference by the federal courts, state procedures which authorize litigation challenging a tax after the tax has been paid')." *Id.*, 101 S.Ct. 1233-1234.

With tax refunds for state taxes previously paid, as with injunctions directed against the enforcement of state tax laws, the exclusive remedy should reside with the states. We quote again from *Rosewell:*

> "When it passed the Act, Congress knew that state tax systems commonly provided for payment of taxes under protest with subsequent refund as their exclusive remedy. The Senate Report to the Act noted:
>
> > 'It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies to survive while long-drawn-out tax litigation is in progress.' S. Rep. No. 1035, 75th Cong., 1st Sess., p. 1 (1937). See H.R. Rep. No. 1503, 75th Cong., 1st Sess., p. 2 (1937).
>
> See also *Matthews* v. *Rodgers,* 284 U.S. 521, 526 (1932)." *Id.* at 1234.

Missouri does provide a tax refund procedure for taxes paid under protest even in situations wherein it is alleged that the excess taxes resulted from an inflated property assessment. *Breckenridge Hotels Corporation* v. *Leachman,* 571 S.W.2d 251 (Mo. banc 1978).

The Tax Injunction Act must be found to bar the pe-

titioners' lawsuit to avoid the anomaly that a taxpayer refusing to pay his taxes is barred from enjoining their collection, whereas a taxpayer paying his taxes under protest may sue in federal courts for recovery.

CONCLUSION

The judgment of the Court of Appeals, affirming the dismissal of the petitioners' complain by the District Court, should be affirmed.

Respectfully submitted,

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No. 80-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., J. DAVID CASSILLY, and LYNN F. CASSILLY,

Petitioners,

v.

GENE MCNARY, WILLIAM A. SKAGGS, EDMUND J. PUNG, CHARLES T. SCHNEIDER, FRANK J. ANTONIO, DONALD G. WILLIAMS, TOM R. OTTO, and STEPHEN C. SNYDER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents have made such arguments as one can to support their view that the Tax Injunction Act, 28 U.S.C. §1341, bars Petitioners' damages action. In addition, they have appealed to the Court to decide, as a legislative matter, whether Petitioners' action *should* be cognizable in federal court. Thus, Respondents have broadened the inquiry here beyond an exploration of the Tax Injunction Act to a search for some ambiguous principle of social policy that they contend would sup-

port barring the federal courts from exercising jurisdiction in this litigation. In doing so, Respondents have appealed, with marginal respect for precedent, to the doctrine of comity, equity, and federalism, and to the doctrine of exhaustion of judicial and administrative remedies.[1]

At bottom, Respondents contend that Petitioners' lawsuit invites the federal courts to insert themselves, inappropriately, into state assessment and taxation matters. Petitioners reply that neither the reasons nor the precedents supporting the doctrines to which Respondents draw the Court's attention (nor those supporting the Tax Injunction Act) justify barring this matter from proceeding to trial on the merits. Beyond doubt, those doctrines do place limits on federal jurisdiction in 42 U.S.C. §1983 claims. But, Petitioners' claim is squarely within the mainstream of traditional §1983 claims over which the federal judiciary has actively exercised jurisdiction.

I. The Doctrine Of Comity, Equity, And Federalism Is Inapplicable To Petitioners' Action At Law For Damages.

In *Younger* v. *Harris,* 401 U.S. 37 (1971), the Court enunciated the doctrine of comity, equity, and federalism, that is, that the federal courts would abstain, except in extraordinary circumstances not claimed here, from enjoining pending state criminal prosecutions. In so deciding, the Court rested its position on the considerations of "equity jurisprudence" that preclude equitable relief in instances in which there are adequate remedies at law, and notions of "comity" that call for a proper respect for state functions as separate and distinct from federal. 401 U.S. at 43-44.

---

[1]Reference to "Respondents" is to all Respondents herein. Reference to the "McNary Respondents" is to Respondents McNary, Skaggs, Antonio, Pung, and Schneider as they have stated their positions in their joint brief, and reference to the "Williams Respondents" is similarly to Respondents Williams, Otto, and Snyder.

Petitioners suggest that the doctrine of comity, equity, and federalism is inapplicable to bar federal jurisdiction here for two reasons: First, equity jurisprudence and comity considerations that sometimes dictate federal court abstention are not present here, and second, the Court has never extended the doctrine to bar actions other than those that were equitable in nature.

A. Considerations of equity jurisprudence.

The considerations of equity jurisprudence are essentially the same as those expressed in the cases contemporaneous with and preceding enactment of the Tax Injunction Act and with the legislative history of that act. *See, e.g., Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 300 (1943); *Matthews* v. *Rodgers,* 284 U.S. 521, 525 (1932), and the legislative history of the Tax Injunction Act detailed in Part III of Petitioners' brief in chief. Just as those considerations did not support finding that the Tax Injunction Act is a bar to this case (*see* Petitioners' Brief at 26-27, 32-34), they do not suggest that the doctrine of comity, equity, and federalism should bar this case. This is true for the simple reason that Petitioners are not requesting that the Court permit the district court below to exercise its equity jurisdiction. This is an action at law for damages.

B. Considerations of comity.

The concern for comity, at least in respect to challenges to some administrative state functions like assessment and taxation, can perhaps best be discerned by examining two of the Court's decisions, *Rizzo* v. *Goode,* 423 U.S. 362 (1976), and *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975). Taking these two cases together, the Court has said that the federal judiciary should not intervene by exercising its equity power to participate in the formulation of state judicial or administrative programs—for example, the organization of citizen complaint procedures regarding police misconduct in the case of *Rizzo* and control of pornographic movie theaters in *Huffman.* In the area

of state taxation, these cases suggest that the federal judiciary should not exercise its equity authority to instruct state and local officials on the method by which they will eliminate costitutionally infirm taxation practices. Instead, and except in extraordinary circumstances, injured taxpayers should confine their efforts to reform assessment and taxation programs to efforts within the state administrative, judicial, and political systems.

Petitioners here, however, have presented a quite different litigation. Petitioners have sued individuals, not a state agency, for the damages those individuals have caused Petitioners in intentionally and systematically depriving Petitioners of their constitutional rights. If Petitioners prevail, they will obtain damages that include both the amount of the excessive taxes imposed upon them and the amount by which they were otherwise injured as a result of being subjected to the wrongful discrimination.[2]

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[2]In their briefs, both sets of Respondents have asserted erroneously that the claim of Petitioners J. David and Lynn F. Cassilly (the only Petitioners upon whose claims this case turns, *see* Petitioners' Brief at 6-8) is only for (1) the amount by which they were taxed excessively and (2) punitive damages. Williams Respondents' Brief at 2, 19-20; McNary Respondents' Brief at 4, 10-11. This is obviously wrong in respect to Petitioners' Second Claim for Relief (J.A. 10-12), where the amount of excessive taxation may not even be a proper measure of the damages incurred. While the McNary Respondents finesse that question altogether, the Williams Respondents recognize their effort to characterize Petitioners' claims as merely for tax refunds fails when considering the Second Claim for Relief. Therefore, they undertake at page 20 of their brief to respond to the claim by asserting, without authority, that the claim "is totally without substance upon its face." Such an assertion improperly invites the Court to determine in this proceeding whether Petitioners have failed to state a claim upon which relief may be granted as a matter of substantive law when the determinations below have been confined to the question of jurisdiction. That improper invitation by the Williams Respondents is necessitated, however, by the great effort that they make to establish that Petitioners' case is naught but a tax refund action into which some punitive damage claim has been thrown.

If Petitioners prove the requisite malicious conduct, they will also win punitive damages. And, no damage judgment can be rendered in this case forcing any payment from public funds to Petitioners. Moreover, Petitioners have not asked the court to establish new standards within which Respondents are to act in order to avoid violating Petitioners' civil rights. Instead, Petitioners have claimed damages for Respondents' knowing, intentional, and malicious prior violations of Petitioners' civil rights.

In deciding Petitioners' case, the court will not be required to appraise the value of property—a question more properly within the state administrative taxing authority. Rather, to prevail Petitioners must prove that they were placed in a class (new home owners) that was impermissibly distinguished from a broader class (home owners) and that their impermissible class was treated materially and injuriously different from the broader class. They allege that material injury results from their class being assessed at the rate 33 1/3 percent of the appraised value of homes, rather than 22 percent, the rate applied in the broader class. Thus, determination of their damages arising out

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Even if the Williams Respondents' inappropriate invitation in respect of the Second Claim for Relief had any merit, one is faced with the fact that the damages claimed in the First Claim for Relief are *not* limited to the amount by which Petitioners were excessively taxed and punitive damages. While the claims were so limited for the tax years 1975 and 1976, they were not for the tax years 1977, 1978, and 1979. A comparison of the allegation of the amount by which Petitioners should have been taxed in paragraph 29 of Petitioners' complaint with the prayers for relief for the First Claim manifests damages in excess of the excessive taxation in the amount of $600 for 1977, $288 for 1978, and approximately $500 for 1979. J.A. 10-13. Dismissal of the lawsuit prior to discovery and presentation of the merits may have contributed to Respondents' respective confusion. The fact remains, however, that in addition to claiming excess taxes as damages, Petitioners have claimed as damages (1) additional injuries resulting from their having suffered discriminatory taxation in 1977, 1978, and 1979, (2) injuries resulting from their having been singled out and reassessed as taxpayers who successfully appealed in prior years, and (3) punitive damages.

of excessive taxes neither supplants nor requires the expertise-dependent activity of appraisal. It requires only the mechanical analysis of which ground rule applies.

In fact, Petitioners have stated a garden variety §1983 damages action. To state such a claim, "two—and only two—allegations are required" under the statute:

> First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. *Gomez* v. *Toledo,* 446 U.S. 635, 640 (1980), *citing Monroe* v. *Pape,* 365 U.S. 167, 171 (1961).

Thus, the comity consideration is reduced to the concern that somehow holding public officers liable for damages for their willful, intentional, and systematic discrimination against Petitioner taxpayers constitutes an inappropriate intrusion of the federal judiciary into state assessment and taxation programs. Petitioners will demonstrate below that the Court has never found such a minimal consideration sufficient to abstain. Moreover, they submit that such abstention is unnecessary in these circumstances because three further considerations provide safeguards to limit any danger that may be implicit in creating such potential for liability.

First, as Petitioners point out in Part V of their brief in chief, Respondents are protected by official immunity. They are not exposed to liability unless they are guilty of bad faith conduct toward Petitioners—for example, conduct that is malicious, willful, invidious, intentional, and knowing or in violation of established constitutional rights. *See Wood* v. *Strickland,* 420 U.S. 308, 321-22 (1975).

Second, Petitioners contend that their rights were violated because Respondents systematically singled them out into an impermissible class and prejudicially assessed taxes against that

class. Such allegations impose a heavy burden on Petitioners to demonstrate that the individual Respondents were "palpably arbitrary" or "invidious" in drawing the classification against which Petitioners complained. *Allied Stores* v. *Bowers,* 358 U.S. 522, 530 (1959), *cited in Lehnhausen* v. *Lakeshore Auto Parts Co.,* 410 U.S. 356, 360 (1973). *See Snowden* v. *Hughes,* 321 U.S. 1, 9 (1944):

> Another familiar example [of a potential violation of the Equal Protection Clause] is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by statute.

Third, the risk that §1983 defendants will be made the subject of frivolous actions causing them great expense even though they ultimately prevail was largely eliminated by amendment of 42 U.S.C. §1988. That permitted a court to award attorney's fees as well as costs to a prevailing party in §1983 actions.

In summary, the reasons supporting federal abstention are largely not present in this case. To the extent that there are comity considerations present, other protections of state administrators through the official immunity doctrine, the burdens for plaintiffs to prevail in an equal protection claim, and the power of a federal court to award attorney's fees to protect against abusive litigation, reduce those considerations to a bare minimum.

C. Absence of precedent.

In these circumstances, the Court should not interpose the doctrine of equity, comity, and federalism in this case unless some compelling precedent so requires. The fact is that the precedents do not require such an application. None has gone nearly so far as to bar jurisdiction in a case like the one presented here. The Court has applied the doctrine of comity, equity, and federalism to bar injunctions against criminal prosecutions. *Younger* v. *Harris*, 401 U.S. 37 (1971). It has extended the doctrine to bar injunctive actions in civil proceedings, at least when those proceedings were closely connected with the operation of the criminal laws. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). It has further extended the doctrine to apply to actions against public officials where the plaintiffs sought the broad exercise of the equity powers of the federal court to supervise management of a police department. *Rizzo* v. *Goode*, 423 U.S. 362 (1976). But, it has never extended the doctrine to actions at law for damges and has never so much as intimated that it plans to.

It is not surprising that Judge Nangle below did not consider the application of the *Younger* doctrine on point in this proceeding. Instead, he cited *Younger* to support the reasonableness of the conclusion that he was drawing under the Tax Injunction Act. *Fair Assessment in Real Estate Association* v. *McNary*, 478 F. Supp. 1231, 1234 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980); Pet. App. A-7 to A-8. He recognized that, if there were a bar to this action, it would not be founded upon concepts of comity, equity, and federalism, but upon the Tax Injunction Act.

II. No Requirement Of Exhaustion Of Administrative Or Judicial Remedies Constitutes A Bar To This Action.

Throughout their briefs, Respondents refer to the availability of state remedies and the supposed failure of Petitioners to exhaust them. In doing so, they appear to rely upon three

sometimes intermingled theories. First, they seem to suggest that a failure to exhaust state remedies either does or should, in and of itself, interpose a bar to Petitioners' action being heard in federal court. Second, they seem to suggest that there are available remedies under Missouri law that Petitioners could have pursued, and that that somehow raises the bar of the Tax Injunction Act. Third, they seem to suggest that the absence of an obligation to exhaust state remedies in §1983 actions under the authority of *Monroe* v. *Pape*, 365 U.S. 167 (1961), enhances the persuasiveness of the position that Petitioners' action threatened an undue intrusion by the federal judiciary into matters left more properly to state adjudication.

A. No exhaustion requirement.

The first of these theories is made most prominently by the Williams Respondents in Part II of their brief. They rest primarily on the fact that the Court in *First National Bank* v. *County Commissioners*, 264 U.S. 450 (1924), ruled that certain taxpayers could not press their claims of taxation in violation of the taxpayers' right to protection under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because the taxpayers had not availed themselves of existing adequate state remedies. Reliance on *First National Bank* to impose a duty on Petitioners to exhaust state remedies is surprising and seemingly meritless in light of the Court's subsequent decisions. For example, in *McNeese* v. *Board of Education*, 373 U.S. 688 (1963) and *Monroe* v. *Pape*, 365 U.S. 167 (1961), the Court held that exhaustion of administrative remedies is not a precondition to pursuit of a §1983 claim in federal court. The Williams Respondents' reliance on *Matthews* v. *Rodgers*, 284 U.S. 521 (1932); *Great Lakes Dredge & Dock Co.* v. *Huffmann*, 319 U.S. 293 (1943); *Tully* v. *Griffin*, 429 U.S. 68 (1976); and *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221 (1981), lends no serious support to this argument. As deminstrated in Part IV of Petitioners' brief, these cases manifest the tradition that the federal courts are barred from ex-

ercising equitable jurisdiction to direct state tax and other state administration—and reflect little more.

Even though relief from the exhaustion doctrine in §1983 cases continues to be the state of the law, *see Wilwording* v. *Swenson*, 404 U.S. 249 (1971) (*per curiam*); *Damico* v. *California*, 389 U.S. 416 (1967) (*per curiam*), some commentators have expressed reservations about the absence of an exhaustion doctrine. For example, in commenting on the line of cases considering the absence of an exhaustion requirement in a §1983 action, Justice (then Judge) O'Connor observed,

> [m]ore recently, however, the Court has stated, "whether this is invariably the case . . . is a question we need not decide." In *Barry* v. *Barchi*, [443 U.S. 55, 63 n.10 (1979)] the Court reaffirmed the *Gibson* v. *Berryhill* [411 U.S. 564 (1973)] holding that exhaustion of administrative remedies is not required when the question of the adequacy of administrative remedies is for all practical purposes identical with the merits of the Section 1983 action. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Judge*, 22 Wm. & Mary L. Rev. 801, 809 (1981) [footnotes omited], *quoting Gibson* v. *Berryhill*, 411 U.S. at 574-75.

Barry, *Gibson*, and other cases may very well have signaled the introduction of a form of exhaustion requirement to some §1983 actions—those that have focused upon alleged violations of the Due Process Clause of the Fourteenth Amendment. Thus, in *Barry*, the Court rejected the defendant's view that the plaintiff should have exhausted administrative remedies since the plaintiff was claiming that the particular process to which he was subject (that of having a harness racehores trainer's license suspended without pre- or prompt post-suspension hearings) was itself the constitutionally infirm procedure. Likewise, in *Gibson*, the Court found that the question of exhaustion of administrative remedies was not relevant where the plaintiff's at-

tack was upon the nature of the constituents of the relevant administrative agency.

Out of this thinking emerges a new line of decisions that does find a certain kind of exhaustion to be necessary. These cases require that a plaintiff exhaust his possible state court remedies before he will be heard to complain that he has lost his federal right to be free from deprivation "of life, liberty or property without due process of law." *See Parratt* v. *Taylor,* ____ U.S. ____, 101 S.Ct. 1908 (1981); *Ingraham* v. *Wright,* 430 U.S. 651 (1977); *Paul* v. *David,* 424 U.S. 693 (1976).

In *Parratt,* the Court would not find a Due Process violation for a prisoner who claimed to have been injured by penal officials who lost the prisoner's $23.50 mail ordered hobby materials, where the plaintiff could have pursued a state sanctioned tort claims procedure to redress the wrong. The Court reasoned that the plaintiff could not reasonably contend that his right to the protection of Due Process was lost when he could have pursued state proceedings to obtain that protection. Thus, *Parratt* teaches that the examination of the availability of due process in a particular case includes a review of both pre-and reasonable post-deprivation procedures that state law provides. *Parratt* does not reintroduce the exhaustion requirement in §1983 actions that the Court excluded in *Monroe* v. *Pape.* As the Court said, "Our decision today is fully consistent with prior cases." ____ U.S. at ____, 101 S.Ct. at 1917. *See also Paul* v. *Davis* (the availability of an action for defamation was sufficient to afford due process where a police official allegedly wrongfully published a plaintiff's picture) and *Ingraham* v. *Wright* (the availability of civil and criminal assault remedies provided adequate due process for a plaintiff who alleged wrongful corporal punishment in a public school).

Legitimate as these cases may be in bringing a measure of an exhaustion-of-state-remedies requirement back into a class of §1983 actions, they are fully inapposite to the instant case.

Here, Petitioners alleged that the individual Respondents have intentionally and systematically singled them out for discriminatory treatment. The alleged violation of the Equal Protection Clause, as well as the Due Process Clause, cannot be remedied by reference to state common law tort. Therefore, the question that Petitioners could conceivably have presented in a state proceeding "is for all practical purposes identical with the merits of [Petitioners'] section 1983 action." O'Connor, *supra*, at 809. Respondents' first suggestion that Petitioners' failure to exhaust state remedies bars their action is simply without merit.

B. Irrelevance of the availability of state remedies.

Respondents' second and third appeals to the relevance of the doctrine of exhaustion of remedies each deserve short shrift. Their second contention in this area is that the availability of state judicial and administrative remedies proves the existence of "plain, speedy and efficient" state remedies, which in turn raises the bar of the Tax Injunction Act. Most assuredly, the availability of adequate state remedies may go a long way to proving the presence of "plain, speedy and efficient" remedies within the meaning of the Tax Injunction Act and result in application of the Act to bar a suit brought in federal court for injunctive relief on matters related to state taxation. But, the presence or absence of plain, speedy, and efficient remedies only determines whether there shall be an exception to the jurisdictional bar once it has been determined that the Act applies. It is that latter question—whether the Tax Injunction Act bars the action—that is at issue here, not whether Missouri tax administration allows for plain, speedy, and efficient remedies.

C. Effect of absence of an exhaustion requirement.

In their third contention, which argues in the exact opposite direction from the first, Respondents would have the Court find a greater justification for the application of the doctrine of comity, equity, and federalism from the absence of an exhaustion requirement. Since exhaustion is not required, the argument

seems to suggest that plaintiffs have a greater opportunity to be heard in federal court in these cases and, therefore, the risk of undue federal intrusion into state administration rises. While the absence of an exhaustion requirement may increase the number of federal cases heard, it does not necessarily follow that that increases the risk of undue federal instrusions. In Part I of this Reply Brief, Petitioners have explored the sort of comity considerations that give rise to the worry about undue federal intrustion. The mere possibility of more cases arising because of the absence of the exhaustion requirement, however, does not help answer the question whether those cases are of the sort that puts the federal courts into administrative matters more properly within the dominion of the states.

Moreover, this argument rests on a classical logical fallacy. The argument goes like this: Congress enacted §1983 to make the federal courts "guarantor[s] of basic federal rights against state power . . . ." *Mitchum* v. *Foster,* 407 U.S. 225, 239 (1972). Therefore, plaintiffs generally need not exhaust their state remedies to pursue a §1983 action. *Monroe* v. *Pape,* 365 U.S. 167 (1963). But (according to Respondents), because there is no exhaustion requirement, the Court should apply *Younger* v. *Harris,* 401 U.S. 37 (1971), and abstain from jurisdiction over §1983 actions. Therefore, the federal courts are barred from hearing such actions and, to that extent, from being "guarantor[s] of basic federal rights against state power . . . ." Catch-22.

All of Respondents' efforts to raise the absence of exhaustion as an issue that would bar the district court's jurisdiction in this action fail.

III. Notwithstanding Respondents' Arguments, the Tax Injunction Act Does Not Bar this Action.

Respondents make several arguments as to which Petitioners have already commented in their brief in chief and make no fur-

ther comment here. Respondents introduce some additional arguments that do require comment. A *seriatum* review of these, however, will disclose that Respondents do not have a convincing case that the Tax Injunction Act bars this action.

A. The Act's language.

The McNary Respondents quarrel with the plain meaning of the statutory language "enjoin, suspend or restrain," but to no avail. First, these Respondents invoke wooden application of a maxim of statutory construction to insist that "enjoin," "suspend", and "restrain" must have distinctly separate meanings in order to avoid "suspend" and "restrain" being surplusage. Yet, the combination of words in the Tax Injunction Act is not an anomaly. Other statutes similarly enumerate closely related judicial powers. For example, in a jurisdictional statute relating to the Interstate Commerce Commission, Congress empowered federal district courts to "enforce, *enjoin,* set aside, annul, [and] *suspend*" certain orders. 28 U.S.C. §1336(b) (emphasis supplied). Perhaps a more appropriate maxim is "noscitur a sociis," that is, that "general and specific words which are capable of an analogous meaning being associated together take color from each other so that the general words are restricted to a sense analogous to the less general." *Dunham* v. *State,* 140 Fla. 754, 758, 192 So. 324, 326 (1939).

Congress has used the various terms interchangeably: While the federal appellate courts have general jurisdiction over proceedings to "*enjoin* or *suspend*" rules, regulations, and orders of the Interstate Commerce Commission pursuant to 28 U.S.C. §2321(a), the statute making that provision applicable to the Department of Agriculture refers to the powers of "*suspending* or *restraining* . . . or setting aside" such orders. 7 U.S.C. §217 (enacted in 1921) (emphasis supplied).

Second, the McNary Respondents arbitrarily pick and choose meanings for the three words, ascribing, on the one hand, an unidentified "legal" meaning to "enjoin" and, on the other,

vernacular definitions from a 1969 Webster's Dictionary to "suspend" and "restrain." Morever, the broad vernacular meaning for "restrain," so enthusiastically embraced by these Respondent, renders "enjoin" and "suspend" superfluous, an outcome inconsistent with these Respondents' insistence on separate meanings.

The Tax Injunction Act delimits federal courts powers. The words are all terms of art denoting direct coercive, or equitable, judicial powers. *See Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 299 (1943). Examination of like statutes, such as 28 U.S.C. §1336 and 28 U.S.C. §2342, gives rise to the same inference that the words are used as descriptions of particular forms of equitable powers. A court "restrains" when it issues a restraining order; a court "suspends" when it issues a stay. The McNary Respondents point to no legal authority for a definition of "restrain" as simply anything that has ill effects. There is none.

Instead, Congress's use of "restrain" in §1341 is limited to its meaning as an exercise of equity. Consider its use in a parallel statute enacted contemporaneously with the Tax Injunction Acm. The Agricultural Adjustment Act divests all courts of power to entertain suits having the purpose or effect of "preventing or restraining" or obtaining declaratory judgments regarding the assessment or collection of certain commodity processing taxes. 7 U.S.C. §623. Judicial interpretations of that statute rendered prior to the enactment of §1341 identify it as a restriction on the equitable jurisdiction of federal courts, without a concomitant limitation on jurisdiction over actions at law. *See, e.g., Rickert Rice Milling Co.* v. *Fontenot,* 79 F.2d 700 (5th Cir. 1935); *Grosvenor-Dale Co.* v. *Bitgood,* 12 F. Supp. 416 (D. Conn. 1935). It would be incongruous if Congress subsequently used the narrower language of the Tax Injunction Act to attempt to create a prohibition that extended to legal as well as equitable actions. The Court must infer that in using terms with "an accumulated settled meaning under . . . equity,"

Congress intended to incorporate that established meaning. *N.L.R.B.* v. *Amax Coal Co.*, ___ U.S. ___, ___, 101 S.Ct. 2789, 2794 (1981).

B. Actions for damages contemporaneous with the enactment.

Respondents incorrectly assert that the focus on injunctive relief in congressional deliberations reflected the total absence at the time of actions for damages that involved attacks on state taxation in the federal courts. Though perhaps less notorious than injunctive actions, such federal court damage actions were by no means unknown at the time of the Act's passage. State remedies at law clearly existed, both under the statutory refund schemes described in the legislative history, *see, e.g.*, Sen. Rep. 1035, 75th Cong., 1st Sess. (1937), and under common law tort theories, *see, e.g.*, *McPike* v. *Pew*, 48 Mo. 525 (1871); *Harrington* v. *Glidden*, 61 N.E. 54, 55 (Mass. 1901). Taxpayers invoking diversity jurisdiction could seek these state remedies in the federal courts. At the time that Congress considered the Tax Injunction Act, federal courts, exercising both diversity and federal question jurisdiction, had held state or local tax officials personally liable in damages for wrongfully obtained taxes. *See Tyler* v. *Dane County*, 289 F. 843 (W.D. Wis. 1923); *International Paper Co.* v. *Burrill*, 260 F. 664 (D. Mass. 1919).

Congress is presumed to have known the existing state of the law when it acted. Yet Congress used statutory language that did not divest federal courts of all jurisdiction over state tax related matters. It knew that such actions would survive the prohibition but chose—for whatever reason—to permit that outcome.

C. Lower court decisions.

The Williams Respondents overstate the support for their position to be found in prior judicial interpretations of the Act. They suggest that the lower federal courts have uniformly held

§1341 to bar tax refund actions. Petitioners do not deny that some lower federal courts have so held. In their brief in chief, Petitioners identified both cases in which tax refund actions were barred and those in which such actions were permitted.

Respondents, however, claim too much support for their position by erroneously listing a number of cases without precedential value. For example, *United States* v. *State Tax Commission*, 505 F.2d 633 (5th Cir. 1974), involved injunctive relief exclusively and the court's holding was so limited. In *Gray* v. *Morgan*, 371 F.2d 172 (7th Cir. 1966), the plaintiffs sought injunctive and declaratory relief and a tax refund. The court there held that §1341 bars federal courts from granting the "equitable relief" sought and made no comment on the ancillary tax refund claim. In *Natural Gas Pipeline Co.* v. *Sergeant*, 337 F. Supp. 88 (D. Kan. 1972), the plaintiffs sought injunctive relief that would limit the taxing authority's spending. The court stated that tax refund procedures are integral to state tax administration; it did not consider the permissibility of tax refund actions in federal courts.

Similarly, of the five cases Respondents cite as "specifically holding" that §1341 bars damage actions, three do not so hold. Of those, two did include damage, as well as equitable, claims, but the courts dismissed them because §1341 deprives federal courts of jurisdiction over actions to enjoin state tax matters; neither court addressed the proper treatment of damage actions. *Hickman* v. *Wujick*, 488 F.2d 875 (2d Cir. 1973); *Horn* v. *O'Chesky*, 378 F. Supp. 1280 (D.N.M. 1974). In the third case, the court expressly stated that §1341 does not necessarily bar actions for damages. *Ludwin* v. *City of Cambridge*, 592 F.2d 606, 609 (1st Cir. 1979).

Because the support for Respondents' interpretation is thin, they disparage the judicial support for federal jurisdiction over tax related damage actions as insubstantial and shallow. Comparison of the cases yields a contrary conclusion. First, consider

two opinions that extended the Act's jurisdictional bar to actions for damages. *Fair Assessment in Real Estate Association* v. *McNary*, 478 F. Supp. 1231 (E.D.Mo. 1979), *aff'd*, F.2d (8th Cir. 1980); Pet. App. at A-4; *Advertiser Co.* v. *Wallace*, 446 F. Supp. 677 (M.D. Ala. 1978).

The *McNary* decision offers little guidance: the district court treated the damage suit as a tax refund action and simply applied the reasoning of the tax refund cases. 478 F. Supp. at 1233; Pet. App. at A-7. The court in *Advertiser* did address the impact of §1341 on damage actions, but it treated the damage action as an analog to tax refund proceedings and, for support, relied almost exclusively upon tax refund cases. *See* 446 F. Supp. at 679-80. Beyond tax refund cases, that court consulted only note 17 to Justice Brennan's concurring opinion in *Perez* v. *Ledesma*, 401 U.S. 82, 127 n.17 (1971).

Without more than a cursory acknowledgement of the distinctions between damage actions on the one hand and tax refund suits and anticipatory suits on the other, the court in *Advertiser* made an analytical leap to extend the bar to damage actions. Speculating that the threat of liability would deter tax officials from assessing and collecting taxes, it concluded that damage actions would impermissibly "restrain" tax collection. *Advertiser*, 446 F. Supp. at 680. Last, the district court determined that it could not grant relief that included the amount of the plaintiff's tax liability and therefore could grant no relief at all. *Id.*

At most, the solitary case that has barred damage actions qua damage actions on the basis of the Tax Injunction Act is an isolated decision by a lower court not even accepted in its own circuit. In a subsequent case involving prayers for injunctive and declaratory relief as well as damages, the Fifth Circuit totally ignored the *Advertiser* decision and confined itself to a narrow view of the damages question. *See A Bonding Co.* v. *Sunnuck*, 629 F.2d 1127, 1132-33 (5th Cir. 1980). *Accord, Ludwin* v. *City of Cambridge*, 529 F.2d 606 (1st Cir. 1979).

In marked contrast to the haphazard analysis of the *Advertiser* decision, the Seventh Circuit in *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978), followed the traditional analytical steps, reviewing legislative history, historical background, pertinent judicial interpretation, and underlying policy considerations. That court separated challenges to the validity of state tax laws from complaints of individual misconduct causing constitutional violations and concluded that the former belong in state courts, the latter, at least in part, in federal. *Id.* at 1078. Such assignment of state law questions to state courts and federal questions to federal courts reflects both the design envisioned by the framers of §1341, *see* 81 Cong. Rec. 1415, 1416 (Feb. 19, 1937), and the remedial purposes of §1983. *Id.*

The Seventh Circuit addressed the expressed concern that the threat of liability might deter tax collection and recognized that the availability of qualified immunity for tax officials would preclude that effect. *Id.* at 1080. Immunity shields public officials—from governors to tax collectors—so that they may perform their duties without "undue timidity." *Wood* v. *Strickland,* 420 U.S. 308, 321 (1975).

Unlike *Advertiser,* the *Fulton Market* decision does not stand alone. In the most recent interpretation of the scope of the Act's prohibition, rendered too late for reference in Petitioners' brief in chief, the Sixth Circuit followed a like analysis and also rejected application of the bar to an action for damages arising from tax official misconduct. *Northwood Apartments* v. *LaValley,* 649 F.2d 401 (6th Cir. 1981).

CONCLUSION

For the reasons stated above and in Petitioners' brief in chief, Petitioners respectfully request that the Court reverse and vacate the order of the Court of Appeals for the Eighth Circuit and direct that court to remand the matter to the district court for trial on the merits.

Respectfully submitted,

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FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., et al.,

Petitioners,

vs.

GENE McNARY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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In The

Supreme Court of the United States

October Term, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., et al.,

Petitioners,

vs.

GENE McNARY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

INTEREST OF AMICUS CURIAE

Counsel for the International Association of Assessing Officers has been advised in telephone conversations by the three counsel for the parties to this case that the three counsel each consent to the filing of an *amicus*

brief by the I.A.A.O. Moreover, those three counsel have advised that they have forwarded their written consent to the Clerk of the Supreme Court.

The International Association of Assessing Officers has approximately 8,750 members. Most of the members are employees of state and local governments. The members reside in all fifty states and in other countries. The Association is primarily interested in property tax assessment. The eight objectives of the I.A.A.O. as stated in the I.A.A.O. Constitution, Art. 1, Sec. 2, amended as of June 27, 1980, are as follows: (1) to improve the standards of assessment practice; (2) to educate those engaged in assessment practice; (3) to elevate the standards of personnel requirements in assessment offices; (4) to educate the general public in matters relating to assessment practice; (5) to engage in research and to publish the results of studies in assessment administration; (6) to provide a clearinghouse for the collection and distribution of useful information relating to assessment practice; (7) to cooperate with other public and private agencies interested in improving assessment administration; (8) and to promote justice and equity in the distribution of the property tax burden.

The Association is not a "trade union", but rather, is interested in promoting proper and equitable property taxation. Indeed, the allegations of the Complaint, if true, present an embarrassing situation to assessing officers and notions of fairness in general. The situation should be corrected. We do believe, however, that the doctrine of comity was properly addressed by the district court, and that the taxpayer should be remanded to the state courts if the taxing officials can demonstrate that the state courts will hear federal issues and apply appropriate relief under the Constitution of the United States.

SUMMARY OF ARGUMENT

We submit that the district court was correct in concluding that the doctrine of comity, as espoused in *Younger v. Harris*, 401 U.S. 37 (1971), should be applied to the case at bar. The leading tax case presenting this doctrine is *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). In that case this Court held that the doctrine of comity required the federal district courts to refrain from hearing declaratory judgment actions involving the constitutionality of state and local taxes when there is an available remedy to challenge the constitutionality in state court. The doctrine of comity, in tax cases, evolves from the reluctance, by federal courts, to become involved in the fiscal operations of state and local governments when a remedy may be had in the state courts, with ultimate review by this Court. The theory relies on the fact that state and local tax assessments are complex, are designed to operate according to established rules, and involve the fiscal integrity of state and local governments. Moreover, federal constitutional issues are likely to turn on questions of state tax law. *Perez v. Ledesma*, 401 U.S. 82, 127-128, n.17 (1971) (Brennan, J., concurring in part and dissenting in part). This doctrine of comity, we submit, applies equally to refund actions and damage actions. Accordingly, this Court should hold that federal district courts are required to refrain from hearing Civil Rights actions for tax refunds and damages where the federal right may be preserved and litigated in a state court proceeding.

ARGUMENT

THIS COURT SHOULD HOLD THAT FEDERAL DISTRICT COURTS ARE REQUIRED TO REFRAIN FROM ENTERTAINING CIVIL RIGHTS ACTIONS FOR TAX REFUNDS AND DAMAGES IN CASES INVOLVING ALLEGED WRONGFUL ASSESSMENT OF STATE AND LOCAL PROPERTY TAXES WHEN THE FEDERAL RIGHT MAY BE PRESERVED AND LITIGATED IN A STATE COURT PROCEEDING.

The district court below has held that federal district courts should refrain from hearing Civil Rights actions for refunds of wrongfully assessed local real estate taxes, and/or for damages, if the taxpayer has a remedy to challenge those taxes in state court. The district court relied on both the Tax Injunction Act[1] and the long-standing doctrine of comity in coming to its conclusion. The Eighth Circuit Court of Appeals affirmed by a 4-4 vote, with no opinion. *Fair Assessment in Real Estate Association, Inc. v. McNary*, 478 F. Supp. 1231 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980).

We agree with this holding of the district court and urge this Court to adopt it.

Initially we note that although this Court has on numerous occasions been confronted with the issue of whether or not a federal district court should hear a request for an anticipatory injunction based on an allegedly unconstitutional state or local tax (*i.e. Rosewell v. LaSalle National Bank*, 101 S.Ct. 1221 (1981); *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976); *Holt v. Indiana Man-*

[1] 28 U.S.C. §134 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state."

ufacturing Co., 176 U.S. 68 (1900); *Hillsborough v. Cromwell*, 326 U.S. 620 (1946)), this Court has not been squarely presented with the issue of whether or not any particular circumstances require a federal district court to refrain from hearing an action for a tax refund or for damages. We submit, however, that the policy considerations behind this Court's holding in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) (that federal district courts should refrain from hearing declaratory judgment actions challenging state and local taxes when there is an available state court remedy), warrants a similar holding that the Complaint at bar was properly dismissed if the taxpayer's federally protected rights may be adequately preserved by the state courts.

The basis of this Court's reluctance to permit federal anticipatory relief was succinctly stated in *Matthews v. Rodgers*, 284 U.S. 521 (1932). In reversing the award of a tax injunction (prior to enactment of the Tax Injunction Act) and holding that the taxpayer had an adequate remedy in state court, it was stated:

> ". . . The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." [284 U.S. at 525.]

Thereafter, in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) a taxpayer attempted to adjudicate the constitutionality of a state tax under the Federal Declaratory Judgment Act of 1934. In holding that the district court should have exercised its discretion (319 U.S. at 301) to dismiss the declaratory judgment action, leaving the taxpayer to his remedy in state court, this Court stated that:

> "The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of August 21, 1937 [the Tax Injunction Act], are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court. With due regard for these considerations, it is the Court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes." [319 U.S. at 300-301.]

Importantly, the Court in *Great Lakes* relied not on a statute (i.e. the Tax Injunction Act), but rather on the principle of comity as expressed in *Matthews*. (See *Rosewell v. LaSalle National Bank*, 101 S.Ct. 1221, 1229 n.15 (1981).) Justice Brennan has expressed this doctrine as follows:

> ". . . The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer

> insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." [*Perez v. Ledesma*, 401 U.S. 82, 127-128, n.17 (1971) (Brennan, J., concurring in part and dissenting in part).]

We submit that the doctrine of comity should apply to Civil Rights refund and damage action cases for wrongful state tax assessments such as the one at bar. The doctrine would not thereby be extended in any manner. It is rather the taxpayers who have been, in recent years, significantly extending the scope of relief requested of federal district courts in Civil Rights cases. Taxpayers are attempting to avoid this long-standing doctrine by a semantic reshaping of their cases. It would be a sterile distinction for the Court to hold that, while federal anticipatory relief is inappropriate, a federal district court action for refund and damages may thereafter be allowed.[2] The situations present obverse sides of the same coin. The taxpayer's goal appears to be, not relief from the allegedly unconstitutional assessment, but rather a federal district court hearing

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[2] Indeed, in *Great Lakes*, the Court noted that the Tax Injunction Act was "predicated upon the desirability of freeing, from interference by the federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid." 319 U.S. at 301. This is one strand of argument to support the position, which was also adopted by the district court below, that the Tax Injunction Act bars actions such as the one at bar if there is a "plain, speedy and efficient" remedy in the state courts to challenge the tax. See also *Evangelical Catholic Communion, Inc. v. Thomas*, 373 F. Supp. 1342 (D. Vt. 1973), *aff'd mem.*, 493 F.2d 1397 (2nd Cir. 1974); *Advertiser Co. v. Wallace*, 446 F. Supp. 677 (M.D. Ala. 1978); *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); and *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979). However, we leave this issue to the parties to brief.

on such issues.[3] Some taxpayers' unfounded distrust of the state courts (assuming that the state courts will hear federal issues) cannot possibly be a proper grounds for permitting actions such as this to proceed in federal district court. State courts are, of course, bound by the Supremacy Clause of the Constitution when adjudicating federal rights. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-240 (1969). Moreover, as noted by Justice Brennan, the collection of state taxes is done on a "mass" level, in a system designed to operate according to established rules. And constitutional issues are likely to turn on questions of state tax law. *Perez*, 401 U.S. 82, 127-128, n.17. Finally, this Court is always present for review of federal issues. *LaSalle, supra*, 101 S.Ct. 1221, 1230 (1981).

The taxpayer will no doubt suggest that the doctrine of comity has never been applied by this Court to require federal district courts to refrain from hearing Civil Rights damage actions alleging unconstitutional state or local tax assessments. Such damage actions for wrongful tax assessment are, however, a recent innovation. Certain judicial constraints to this general type of lawsuit were lifted relatively recently in *Monroe v. Pape*, 365 U.S. 167 (1961) and *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972). For this reason, this Court is now first considering the issue.

To permit this refund and damage action case to proceed in federal district court may encourage other taxpayers also to circumvent their state court remedies. Such a holding might also encourage taxpayers to bifurcate their claims, and would do little to foster

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[3] And it is clear that the federal district courts' docket is already over-burdened. *Rosewell v. LaSalle National Bank, supra*, 101 S.Ct. 1221, 1232.

comity between the state and federal courts. There is no persuasive reason why taxpayers should have the benefit of being able to select the forum in which the cause will be heard.

The taxpayer in the case at bar may suggest, however, that this *amicus* has presented no standard by which to judge whether or not the state court will preserve the federal rights of which the taxpayer complains. However, if it can be shown that the state courts will hear the federal issues, certainly the state courts would then follow the applicable federal law and award the appropriate federal relief.[4] See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-240 (1969). Requiring the federal district courts to refrain from hearing this case is merely a procedural restriction, which would in no way effect the taxpayer's substantive rights.[5] The parties could present any and all substantive issues to the state court hearing the case.[6]

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[4] Indeed, the allegations of the Complaint, if true, present a deplorable situation. Assessing newer improvements at a higher level of assessment than older improvements is contrary to Missouri law and a denial of equal protection. The same is true with respect to the alleged practice of targeting for reassessment those property owners who obtain judicial relief. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). And we believe the assessing practices alleged in the Complaint to be "plainly unacceptable", as stated in the International Association of Assessing Officers Treatise, Improving Real Property Assessment (Chicago, 1978). If the allegations of the Complaint are true, appropriate relief is ultimately required.

[5] In this respect there is substantial similarity to this Court's recent holding in *Rosewell v. LaSalle National Bank*, *supra*, 101 S.Ct. 1221, 1228-1234.

[6] The district court opinion in the case at bar gives a superficial discussion of the remedy available in the state courts of Missouri. Since the district court expressly held,

(Footnote continued on following page)

To permit this action to proceed in federal district court would permit that court to initially adjudicate the constitutionality of the tax and/or its assessment. The district court would necessarily be required to issue a judgment declaratory of the merits, squarely in opposition to the principles of comity expressed in *Great Lakes* and in opposition to this Court's holding in that case.[7]

[6] *continued*
inter alia, that the Missouri courts would hear the federal issues, presumably the parties will brief that issue. In any event, we note that the Missouri Supreme Court has expressly held that the courts of that state have jurisdiction to hear federal Civil Rights actions brought pursuant to 42 U.S.C. §1983. *Shapiro v. Columbia Union National Bank & Trust Co.*, 576 S.W.2d 310 (Mo. 1978).

[7] See *Evangelical Catholic Communion, Inc. v. Thomas*, 373 F. Supp. 1342 (D. Vt. 1973), *aff'd mem.*, 493 F.2d 1397 (2nd Cir. 1974) for a similar holding.

CONCLUSION

We respectfully conclude that this Court should hold that federal district courts are required by considerations of comity to refrain from entertaining Civil Rights actions for tax refunds and damages involving alleged wrongful assessment of state and local property taxes when the federal rights may be preserved and litigated in a state court proceeding. We, however, take no position as to whether or not the taxpayer has an adequate remedy in the state courts of Missouri, whereby the taxpayer's federal rights may be preserved and litigated, or whether the consideration thereof in the district court was sufficient to support affirmance here, or requires remand for further action.

Respectfully submitted,

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